Articles:

Lawyers' Rare Privilege of Litigating in the Media

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ABSTRACT

Conventional wisdom has long held that high-profile litigation is often decided both in court and in the court of public opinion and that harnessing the power of the press is an essential aspect of a comprehensive legal strategy. How the media reports on litigation is generally thought to affect the resolution of disputes. At the same time, lawyers who press their clients' causes in the media also expose themselves to serious professional risk. Lawyers' litigation privilege, which generally provides them with absolute immunity against liability for defamatory statements made in the course of judicial proceedings in which they serve as counsel so long as the statements relate to the proceedings, rarely applies when they speak to the press or supply information to the media. Attorney immunity is equally unlikely to protect lawyers who litigate their cases in the court of public opinion because communicating with journalists generally does not involve or require a lawyer's professional authority, skill, or training. For these reasons, lawyers are wise to litigate their cases in court rather than in the media.

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I. INTRODUCTION

Former President Donald Trump's legal controversies and grievances are well-known. As a political luminary, that, perhaps, is to be expected. In seemingly every matter in which he is or was involved, Trump's lawyers have commented publicly on the merits of the cases, the nature of the allegations against him, the planned vindication of his claimed rights, the propriety of his conduct, the character or motives of his

adversaries, or some combination of them all.[1] That public commentary might also be expected, although for reasons apart from the ex-president's flair for promotion and publicity. For years, the conventional wisdom has been that high-profile litigation is often decided both in court and in the court of public opinion[2] and that harnessing the power of the press is an essential aspect of a comprehensive legal strategy.[3] How the media reports on litigation is thought to affect the resolution of disputes.[4] Crisis

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1. *See, e.g.*, Laura Irwin, *Trump Lawyer Blasts Jack Smith's Urgency for Ruling in Immunity Case: "It's Un-American"*, THE HILL (Dec. 16, 2023, 4:43 PM), https://perma.cc/7U3Y-ZDAQ. According to Irwin:

> Habba said "everyone can see" what Smith is doing and said it "is election interference at its finest." "They can't beat him in the ballots so they're gonna have to either, you know, lie, cheat, steal or the newest, is lawfare, put him in jail, tie him up," she told Fox Business Network's Larry Kudlow.

Id.; Nick Robertson, *Trump Attorney Says New York Attorney General Is "Just Not that Bright"*, THE HILL (Nov. 7, 2023, 8:07 AM), https://perma.cc/P4DC-EU9S ("Former President Trump's attorney Alina Habba went after New York Attorney General Letitia James on Monday, saying she's 'just not that bright.'"); Holly Bailey & Emily Gardner, *Trump Co-defendant Jenna Ellis Pleads Guilty in Georgia Election Case*, WASH. POST (Oct. 24, 2023, 5:23 PM), https://perma.cc/GX7L-E98C. Quoting Trump lawyer Steve Sadow:

> "For the fourth time, Fani Willis and her prosecution team have dismissed the RICO charge in return for a plea to probation," he said. "What that shows is this so-called RICO case is nothing more than a bargaining chip for DA Willis."

Id.; Emily Johnson, *The Atty Trio Defending Trump in Ga. Election Meddling Case*, LAW360 (Aug. 15, 2023, 4:53 PM), https://perma.cc/RW2K-RUDH. Quoting Trump's lawyers:

> "This one-sided grand jury presentation relied on witnesses who harbor their own personal and political interests—some of whom ran campaigns touting their efforts against the accused and/or profited from book deals and employment opportunities as a result," . . . "We look forward to a detailed review of this indictment which is undoubtedly just as flawed and unconstitutional as this entire process has been."

Id.; *Trump Lawyer says Docs were De-Classified Files, Personal "Mementos"*, FRANCE 24 (June 12, 2023), https://perma.cc/5VPF-B82V. Reporting claims by one of Trump's lawyers:

> His lawyer Alina Habba argued Trump had done "nothing wrong" and would not take a plea deal to minimize fallout from the case . . . . "He would never admit guilt, because there was nothing wrong with declassifying documents," Habba told talk show "Fox News Sunday." "This is completely politically motivated. It's election interference at its best."

Id.; Nate Schweber, *Trump's Lawyer Vows to Appeal the Verdict*, N.Y. TIMES (May 9, 2023), https://perma.cc/NA38-S93A ("Outside of the courthouse in Lower Manhattan, Donald J. Trump's lawyer, Joseph Tacopina, said the trial [involving E. Jean Carroll's sexual abuse and defamation claims against Trump] had been unfair in several ways and his client intended to appeal the verdict.").

2. *See* Steven B. Hantler et al., *Extending the Privilege to Litigation Communications Specialists in the Age of Trial by Media*, 13 COMMLAW CONSPECTUS 7, 7 (2004).

3. *See* Faith Gay & Megan Larkin, *Whether as a Sword or Shield, a Proactive Press Strategy is Essential for Every Litigation Plan*, SELENDY GAY ELSBERG PLLC (Apr. 5, 2021), https://perma.cc/U95Z-RD3Z.

4. *See* Hantler et al., *supra* note 2, at 7–8.

communications specialists and public relations consultants accordingly stand ready to help lawyers formulate media strategies for their clients' cases.[5]

As important as a media strategy sometimes may be, lawyers' advocacy for clients in public forums may also be detrimental, such as when it hardens an adversary's position and thus reduces the chances of settlement or motivates an opponent to litigate more aggressively. Lawyers who press their clients' causes in the media also expose themselves to serious professional risk.[6] Assume, for example, that your organizational client fired several senior executives for financial mismanagement and self-dealing following your internal investigation.[7] Based on your findings, the organization further commissioned you to sue the former executives to recoup seemingly unearned benefits and excessive bonus payments. Finally, concerned about the potential damage to its reputation in the community caused by the former executives' alleged misconduct, the organization authorized you to conduct a press conference to announce the findings of your investigation and the lawsuit against the former executives. Soon after the press conference, one of the former executives sues you and your law firm for defamation, negligence, negligent and intentional infliction of emotional distress, and tortious interference with business expectancies.

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5. *See, e.g.*, Gina F. Rubel, *Everyday Public Relations for Lawyers*, FURIA RUBEL COMMUNICATIONS, INC. (Aug. 2019), https://perma.cc/AHK5-L2AF. Rubel offered the following observation:

> The question of whether a law firm should host a press conference in relation to litigation publicity comes up quite often at our agency . . . . As a rule of thumb, the only time a press conference makes sense is if your story warrants television coverage. Otherwise, it is more efficient and less expensive to contact individual members of the media with your story . . . .

Id.

6. *See, e.g.*, US Dominion, Inc. v. Powell, 554 F. Supp. 3d 42, 58 (D.D.C. 2021) ("Powell cannot shield herself from liability for her widely disseminated out-of-court statements by casting them as protected statements about in-court litigation; an attorney's out-of-court statements to the public can be actionable, even if those statements concern contemplated or ongoing litigation."); Seidl v. Greentree Mortg. Co., 30 F. Supp. 2d 1292, 1315 (D. Colo. 1998). As the *Seidl* court explained:

> [A]n attorney who wishes to litigate her case in the press and via the Internet does so at her own risk. There is no absolute privilege under Colorado law for statements by an attorney . . . made to the press or gratuitous statements posted on the Internet for the purpose of publicizing the case to persons who have no connection to the proceeding except as potentially interested observers.

Seidl, 30 F. Supp. 2d at 1315.

7. This example is derived from Topping v. Meyers, 842 S.E.2d 95, 98 (N.C. Ct. App. 2020).

Alternatively, assume that you represent a high-profile client who has been sued by a protégé for alleged sexual abuse.[8] While still early in the litigation, reports of your client's misconduct are leaked to the city's business journal and generate significant negative publicity for your client. You thus call a press conference where you deny the allegations against your client and accuse the plaintiff and her lawyer of knowingly making false accusations against your client to extort a settlement. In light of your allegation of extortion, which is a crime, the plaintiff's lawyer concludes that he must withdraw from the plaintiff's representation. That decision proves costly in terms of a lost contingent fee when your client eventually pays a substantial settlement. Consequently, the plaintiff's former lawyer sues you for defamation and tortious interference with a business relationship.

Next, assume that your client was sued in connection with a business transaction in which it was ultimately revealed that the plaintiff forged the document on which the case pivoted.[9] You persuade the court to dismiss the case as a sanction for the plaintiff's fraud on the court. You thereafter issue a press release in which you write that the plaintiff's lawyers should be called to account because they knew or reasonably should have known that the lawsuit was a fraud, they conspired with one another to prosecute a sham lawsuit based on fabricated evidence and implausible circumstances, and they continued to pursue the lawsuit even after they learned of the plaintiff's forgery and other acts of dishonesty. Subsequently, one of the plaintiff's lawyers sues you for libel per se. He asserts that your statements in the press release about his knowledge of the plaintiff's dishonesty are untrue and are facially defamatory.

None of these lawsuits may seem threatening at first glance. After all, lawyers enjoy a litigation privilege, also described as a judicial-proceedings privilege or judicial privilege, that provides them with absolute immunity against liability for defamatory statements made in the course of judicial proceedings in which they serve as counsel so long as the statements relate to the proceedings.[10] Because the litigation privilege

8. This example is loosely based on Rothman v. Jackson, 57 Cal. Rptr. 2d 284, 287 (Ct. App. 1996).

9. This example draws on Argentieri v. Zuckerberg, 214 Cal. Rptr. 3d 358, 364 (Ct. App. 2017).

10. *See* RESTATEMENT (SECOND) OF TORTS § 586 (AM. L. INST. 1977). The Restatement's formulation of lawyers' litigation privilege reads:

> 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.

Id.

is absolute, it cannot be overcome, even by a lawyer's alleged malice.[11] The litigation privilege—similarly enjoyed by both litigants and witnesses[12]—serves several important purposes. These include ensuring free access to the courts, promoting complete and truthful testimony by witnesses, encouraging zealous advocacy by lawyers, giving finality to judgments, and avoiding endless litigation.[13] In striving to achieve these purposes, courts extend the litigation privilege to lawyers' out-of-court statements.[14] The litigation privilege also immunizes lawyers against liability for a broad range of claims or causes of action beyond defamation.[15]

In addition, lawyers generally are protected against liability to third parties—that is, to non-clients—by the doctrine of attorney immunity.[16]

11. Privileged communications may be either absolute or qualified. A qualified privilege may also be described as a conditional privilege. If an allegedly defamatory statement is absolutely privileged, the speaker cannot be liable for it even if the statement was made with actual malice. *See* Krile v. Lawyer, 970 N.W.2d 150, 155–56 (N.D. 2022); *see also* Simpson Strong-Tie Co. v. Stewart, Estes & Donnell, 232 S.W.3d 18, 22 (Tenn. 2007) ("A privilege is described as absolute when it is not defeated by the defendant's malice, ill-will, or improper purpose in publishing the defamatory communication."). In contrast, a qualified privilege may be overcome by evidence of malice. *See* Couture v. Trainer, 174 A.3d 1245, 1249 (Vt. 2017); *see also Simpson Strong-Tie Co.*, 232 S.W.3d at 22 (stating that a qualified privilege "may be defeated if the defamatory publication was made with malice, ill-will, or for an improper purpose").

12. *See* RESTATEMENT (SECOND) OF TORTS §§ 587 & 588 (AM. L. INST. 1977).

13. *See* Wentland v. Wass, 25 Cal. Rptr. 3d 109, 115 (Ct. App. 2005).

14. *See* Bassichis v. Flores, 189 N.E.3d 640, 646 (Mass. 2022) ("[A]pplication of the privilege extends beyond statements that are made in the court room itself."); 2820 Mt. Ephraim Ave., LLC v. Brown, No. A-2694-19, A-2699-19, 2021 WL 2934611, at *3 (N.J. Super. Ct. App. Div. July 13, 2021) ("[T]he litigation privilege is not confined to the courtroom.").

15. *See, e.g.*, Begley v. Ireson, 490 P.3d 963, 969 (Colo. App. 2020) (citation omitted) ("Although the privilege was created to protect participants in judicial or quasi-judicial proceedings from liability for defamatory communications, it has been applied more broadly to immunize nondefamatory conduct."); Dorfman v. Smith, 271 A.3d 53, 63 (Conn. 2022) (recognizing that "absolute immunity extends to an array of retaliatory civil actions" beyond defamation); Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole, 950 So. 2d 380, 384 (Fla. 2007) ("The litigation privilege applies across the board to actions in Florida, both to common-law causes of action, those initiated pursuant to a statute, or of some other origin."); Hintermeister v. Belin McCormick, PC, No. 18-1294, 2019 WL 3317365, at *4 (Iowa Ct. App. July 24, 2019) ("The policy considerations motivating the application of the privilege to defamation actions support applying the privilege to other causes of actions based on attorney conduct and statements made in the course of client representation."); Cleavenger v. B.O., 184 N.E.3d 968, 977 (Ohio Ct. App. 2022) ("The privilege is not limited to defamation claims."). *But see* Givago Growth, LLC v. iTech AG, LLC, 863 S.E.2d 684, 688 (Va. 2021) (declining to extend the litigation privilege to torts other than defamation).

16. *See, e.g.*, Kozel v. Kozel, 299 F. Supp. 3d 737, 753 (D.S.C. 2018) ("In South Carolina, an attorney is immune from liability as long as he acts within their professional capacity, on behalf of a client, and with that client's knowledge."); Pursuit Inv. Mgmt. LLC v. Alpha Beta Cap. Partners, L.P., 8 N.Y.S.3d 283, 284 (App. Div. 2015) (holding that a law firm was "immune from liability 'under the shield afforded attorneys in advising their

As Texas courts explain the doctrine, attorney immunity applies when the third party's claim rests on conduct by the lawyer that:

> (1) constitutes the provision of "legal" services involving the unique office, professional skill, training, and authority of an attorney *and* (2) the attorney engages in to fulfill the attorney's duties in representing the client within an adversarial context in which the client and the non-client do not share the same interests and therefore the non-client's reliance on the attorney's conduct is not justifiable.[17]

Attorney immunity is an affirmative defense to third-party claims that is separate and distinct from the litigation privilege.[18] Indeed, attorney immunity applies to claims based on lawyers' allegedly wrongful acts outside of litigation, if the conduct is of the kind described above.[19]

When lawyers speak with the press or provide information to the media, however, the litigation privilege will rarely shield them against defamation allegations or other tort claims arising out of those communications.[20] Although the litigation privilege occasionally applies to lawyers' media activities,[21] it generally does not.[22] This is often because the litigation privilege may be lost through excessive publication, meaning that the offending statement was "published to more persons than necessary to resolve the dispute or further the objectives of the proposed litigation," as when it was circulated "to those who did not have a legitimate role in resolving the dispute" or it was shared with people who lacked a sufficient legal interest in the pending or planned litigation.[23] That may well be the result when a lawyer holds a press conference to publicize

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clients, even when such advice is erroneous, in the absence of fraud, collusion, malice or bad faith'" (quoting Purvi Enters., LLC v. City of N.Y., 879 N.Y.S.2d 410, 412 (App. Div. 2009))); Scholler v. Scholler, 462 N.E.2d 158, 159–63 (Ohio 1984) ("An attorney is immune from liability to third persons arising from his performance as an attorney in good faith on behalf of, and with the knowledge of his client, unless such third person is in privity with the client or the attorney acts maliciously.").

17. Haynes & Boone, LLP v. NFTD, LLC, 631 S.W.3d 65, 78 (Tex. 2021).

18. *See* Landry's, Inc. v. Animal Legal Def. Fund, 631 S.W.3d 40, 51 (Tex. 2021) (distinguishing attorney immunity from the "judicial-proceedings privilege").

19. *See Haynes & Boone*, 631 S.W.3d at 79.

20. *See, e.g.*, *Landry's*, 631 S.W.3d at 48–53 (rejecting the defendants' litigation privilege—which the court called the judicial-proceedings privilege—and attorney immunity defenses).

21. *See, e.g.*, Prokop v. Cannon, 583 N.W.2d 51, 59 (Neb. Ct. App. 1998) (concluding that a lawyer's statement to the press after his client dismissed her lawsuit was absolutely privileged); Chavez-Neal v. Kennedy, 485 P.3d 811, 812 (N.M. Ct. App. 2021) (holding that a lawyer's statements to the media about an ongoing case were absolutely privileged).

22. *See* Jacobs v. Adelson, 325 P.3d 1282, 1286 (Nev. 2014) (stating that most states have held that the absolute litigation privilege does not apply to lawyers' communications with the media and collecting related cases); *Landry's*, 631 S.W.3d at 52 n.13 (collecting cases rejecting the litigation privilege).

23. Krouse v. Bower, 20 P.3d 895, 900 (Utah 2001).

a client's case, issues a press release about a client's case, posts pleadings on her law firm's website, or highlights a client's case on social media.[24]

Attorney immunity is also unlikely to protect lawyers who litigate their cases in the court of public opinion because communicating with journalists generally does not involve a lawyer's "office, professional training, skill, and authority."[25] Anyone can publicize a party's claims or defenses in the media.[26]

This Article examines the application of the litigation privilege and attorney immunity to lawyers' advocacy for their clients in the media. Part II traces the contours of the litigation privilege and succinctly summarizes its essential elements. Part III provides an overview of the attorney immunity defense to third-party liability. Part IV discusses illustrative cases both declining to apply and applying the litigation privilege to lawyers' media dealings and analyzes the competing positions. Finally, Part V outlines alternative defenses available to lawyers.

II. THE LITIGATION PRIVILEGE

Lawyers have various defenses to defamation claims and other alleged torts arising out of their communications related to litigation involving their clients,[27] but few—if any—are generally as effective as the absolute litigation privilege.

A. Overview of the Litigation Privilege

The roots of the litigation privilege trace back centuries.[28] Today, when applying the litigation privilege to lawyers, most courts apply the formulation found in the Restatement (Second) of Torts:[29]

24. *See, e.g.*, GetFugu, Inc. v. Patton Boggs LLP, 162 Cal. Rptr. 3d 831, 840 (Ct. App. 2013) (concluding that a press release and Tweet posted on the Internet were not protected by the litigation privilege); Bedford v. Witte, 896 N.W.2d 69, 72 (Mich. Ct. App. 2016) (stating that posting a complaint on the law firm's website was not absolutely privileged because it was not part of the judicial proceedings but was instead "extraneous and unnecessary" to them); Pratt v. Nelson, 164 P.3d 366, 377 (Utah 2007) (holding that the defendants' statements in a press conference represented excessive publication that erased any privilege they may have otherwise enjoyed).

25. *Landry's*, 631 S.W.3d at 51–52 (quoting Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 482 (Tex. 2015)).

26. *See id.* at 52.

27. See *infra* Part V.

28. *See* Bassichis v. Flores, 189 N.E.3d 640, 646 (Mass. 2022) (explaining that the litigation privilege is rooted in English common law, with the first known decision dismissing an action against a lawyer based on the privilege issued in 1606 and stating that U.S. courts adopted the privilege in the 1800s).

29. *See id.* (asserting that "[n]early every State" has adopted the Restatement version of the privilege).

> 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.[30]

California outlines the privilege test slightly differently. Under California law, the litigation 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."[31] California law also treats the litigation privilege as absolute.[32]

In other deviations from the Restatement approach, Georgia law affords lawyers an absolute privilege for statements in pleadings but confers only qualified immunity for other statements made in performing legal duties.[33] Louisiana grants private lawyers a qualified privilege for statements made in judicial proceedings but affords prosecutors an absolute privilege for statements made within the scope of their prosecutorial duties.[34] New York courts hold that statements made during litigation are absolutely privileged, but communications "pertinent to a good faith anticipated litigation" are entitled to only a qualified privilege.[35]

The application of the litigation privilege is a question of law[36] and is evaluated on a case-by-case basis.[37] As noted earlier, although the litigation privilege originally developed as a defense to defamation claims, courts have expanded it to bar most other civil claims grounded on statements made in connection with judicial proceedings.[38] Courts have

30. RESTATEMENT (SECOND) OF TORTS § 586 (AM. L. INST. 1977).

31. Trinity Risk Mgmt., LLC v. Simplified Lab. Staffing Sols., Inc., 273 Cal. Rptr. 3d 831, 840 (Ct. App. 2021) (citing Silberg v. Anderson, 786 P.2d 365, 369 (Cal. 1990)).

32. *See* Geragos v. Abelyan, 305 Cal. Rptr. 3d 303, 323 (Ct. App. 2023).

33. *See* RCO Legal, P.S., Inc. v. Johnson, 820 S.E.2d 491, 499–501 (Ga. Ct. App. 2018) (discussing GA. CODE §§ 51-5-7 and 51-5-8).

34. *See, e.g.*, Gentry v. Spillers, 325 So. 3d 398, 403–05 (La. Ct. App. 2021) (determining that the lawyer was protected by a qualified privilege); Sinclair v. State *ex rel.* La. Dep't of Pub. Safety & Corrs., 769 So. 2d 1270, 1272 (La. Ct. App. 2000) (concluding that a prosecutor's statements at a parole hearing were not actionable).

35. Front, Inc. v. Khalil, 28 N.E.3d 15, 18–19 (N.Y. 2015).

36. *See* Killmer, Lane & Newman, LLP v. BKP, Inc., 535 P.3d 91, 95 (Colo. 2023); Dorfman v. Smith, 271 A.3d 53, 65 (Conn. 2022); DelMonico v. Traynor, 116 So. 3d 1205, 1211 (Fla. 2013); Mack v. Wells Fargo Bank, N.A., 41 N.E.3d 323, 328 (Mass. App. Ct. 2015); Minke v. City of Minneapolis, 845 N.W.2d 179, 182 (Minn. 2014); Williams v. Lazer, 495 P.3d 93, 99 (Nev. 2021).

37. *See* Chavez-Neal v. Kennedy, 485 P.3d 811, 815 (N.M. Ct. App. 2021).

38. Of course, the litigation privilege still applies to defamation claims. *See, e.g.*, Spencer v. Spencer, 479 N.W.2d 293, 295 (Iowa 1991); Fitzgerald v. Mobile Billboards, LLC, 416 P.3d 209, 211 (Nev. 2018); *Chavez-Neal*, 485 P.3d at 812; Cleavenger v. B.O., 184 N.E.3d 968, 977 (Ohio Ct. App. 2022); Young v. Rayan, 533 P.3d 123, 132 (Wash. Ct. App. 2023).

justified this expansion by reasoning that the purposes underlying the privilege "would be nullified if individuals barred from bringing defamation claims could seek damages under other theories of liability."[39] Thus, and by way of example, courts have concluded that the litigation privilege protects against claims for abuse of process,[40] aiding and abetting a client's breach of fiduciary duty,[41] breach of contract,[42] breach of the implied covenant of good faith and fair dealing,[43] negligence,[44] negligence per se,[45] civil conspiracy,[46] tortious interference with business expectancies,[47] tortious interference with business relationships,[48] tortious interference with contracts,[49] tortious interference with prospective

39. Hugel v. Milberg, Weiss, Bershad, Hynes & Lerach, LLP, 175 F.3d 14, 18 (1st Cir. 1999).

40. *See* EMI Sun Vill., Inc. v. Catledge, 779 F. App'x 627, 635 (11th Cir. 2019) (applying Florida law); Taraska v. Brown, No. 1 CA-CV 18-0714, 2019 WL 6320968, at *2–3 (Ariz. Ct. App. Nov. 26, 2019); Bassichis v. Flores, 189 N.E.3d 640, 647 (Mass. 2022). *But see* Idlibi v. Ollenu, 258 A.3d 121, 125 (Conn. App. Ct. 2021) (concluding that an abuse of process claim did not fall within the litigation privilege).

41. *See* Bergstein v. Stroock & Stroock & Lavan LLP, 187 Cal. Rptr. 3d 36, 53–54 (Ct. App. 2015).

42. *See* Timothy W. v. Julie W., 301 Cal. Rptr. 3d 294, 307 (Ct. App. 2022); O'Brien & Gere Eng'rs, Inc. v. City of Salisbury, 135 A.3d 473, 484–85 (Md. 2016); *see also* Wentland v. Wass, 25 Cal. Rptr. 3d 109, 114 (Ct. App. 2005) ("Our review of . . . cases that have considered the litigation privilege in the context of a breach of contract case, instructs that whether the litigation privilege applies to an action for breach of contract turns on whether its application furthers the policies underlying the privilege.").

43. *See* Dorfman v. Smith, 271 A.3d 53, 75 (Conn. 2022).

44. *See* Teltschik v. Williams & Jensen, PLLC, 748 F.3d 1285, 1287–88 (D.C. Cir. 2014) (applying D.C. law); McCullough v. Kubiak, 158 So. 3d 739, 740–41 (Fla. Dist. Ct. App. 2015); Miller v. Reinert, 839 N.E.2d 731, 735–36 (Ind. Ct. App. 2005); *Bassichis*, 189 N.E.3d at 647; Jones v. Coward, 666 S.E.2d 877, 880 (N.C. Ct. App. 2008); Laub v. Pesikoff, 979 S.W.2d 686, 691–92 (Tex. App. 1998); Clark v. Druckman, 624 S.E.2d 864, 866–72 (W. Va. 2005).

45. *See, e.g.*, Steinmeyer v. Lab'y Corp. of Am. Holdings, No. 22-cv-01213-DMS-DDL, 2023 WL 3940547, at *4 n.3 (S.D. Cal. June 8, 2023) (applying California law); Ginsberg v. Granados, 963 A.2d 1134, 1140 (D.C. 2009).

46. *See, e.g.*, Jackson v. BellSouth Telecomms., 372 F.3d 1250, 1277 (11th Cir. 2004) (applying Florida law); Contreras v. Dowling, 208 Cal. Rptr. 3d 707, 723–24 (Ct. App. 2016); Brown v. Del. Valley Transplant Program, 539 A.2d 1372, 1373–74 (Pa. Super. Ct. 1988); *Laub*, 979 S.W.2d at 691–92; Young v. Rayan, 533 P.3d 123, 129 (Wash. Ct. App. 2023).

47. *See, e.g.*, Deutsche Bank AG v. Vik, 281 A.3d 12, 21 (Conn. App. Ct. 2022); Kocontes v. McQuaid, 778 N.W.2d 410, 424–25 (Neb. 2010).

48. *See, e.g.*, Visto Corp. v. Sproqit Techs., Inc., 360 F. Supp. 2d 1064, 1068 (N.D. Cal. 2005) (discussing California law); Fernandez v. Haber & Ganguzza, LLP, 30 So. 3d 644, 646–47 (Fla. Dist. Ct. App. 2010); Halle v. Banner Indus. of N.E., Inc., 453 S.W.3d 179, 188 (Ky. Ct. App. 2014); *Clark*, 624 S.E.2d at 866–72.

49. *See, e.g.*, W. Techs., Inc. v. Sverdrup & Parcel, Inc., 739 P.2d 1318, 1322 (Ariz. Ct. App. 1986); Buckhannon v. U.S. W. Commc'ns, Inc., 928 P.2d 1331, 1335 (Colo. App. 1996); Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel, 151 P.3d 732, 750–52 (Haw. 2007).

economic advantage,[50] injurious falsehoods,[51] intentional infliction of emotional distress,[52] negligent infliction of emotional distress,[53] invasion of privacy,[54] false light invasion of privacy,[55] the tort of deceit,[56] prima facie tort,[57] false imprisonment,[58] federal civil rights violations,[59] slander of title,[60] and racketeering.[61] The litigation privilege does not, however, shield lawyers from malicious prosecution claims,[62] clients' or former clients' legal malpractice or breach of fiduciary duty suits,[63] contempt of

50. *See, e.g.*, *Kahala Royal Corp.*, 151 P.3d at 750–52.

51. *See, e.g.*, *W. Techs., Inc.*, 739 P.2d at 1321–22.

52. *See, e.g.*, Kenne v. Stennis, 179 Cal. Rptr. 3d 198, 213 (Ct. App. 2014); Dorfman v. Smith, 271 A.3d 53, 63 (Conn. 2022); Barker v. Huang, 610 A.2d 1341, 1349 (Del. 1992); Bedin v. Nw. Mem'l Hosp., 187 N.E.3d 739, 749–51 (Ill. App. Ct. 2021); Hintermeister v. Belin McCormick, PC, No. 18-1294, 2019 WL 3317365, at *4 (Iowa Ct. App. July 24, 2019); Bassichis v. Flores, 189 N.E.3d 640, 647 (Mass. 2022); Jones v. Coward, 666 S.E.2d 877, 880 (N.C. Ct. App. 2008); Cleavenger v. B.O., 184 N.E.3d 968, 977 (Ohio Ct. App. 2022); Laub v. Pesikoff, 979 S.W.2d 686, 691–92 (Tex. App. 1998); Bennett v. Jones, Waldo, Holbrook & McDonough, 70 P.3d 17, 32 (Utah 2003); Scott v. Am. Express Nat'l Bank, 514 P.3d 695, 701 (Wash. Ct. App. 2022); *Clark*, 624 S.E.2d at 866–72.

53. *See, e.g.*, *Dorfman*, 271 A.3d at 75; Brown v. Del. Valley Transplant Program, 539 A.2d 1372, 1373–74 (Pa. Super. Ct. 1988).

54. *See, e.g.*, Foothill Fed. Credit Union v. Super. Ct., 66 Cal. Rptr. 3d 249, 251 (Ct. App. 2007); *Barker*, 610 A.2d at 1349; Johnson v. Johnson & Bell, Ltd., 7 N.E.3d 52, 56 (Ill. App. Ct. 2014); *Bassichis*, 189 N.E.3d at 647; *Brown*, 539 A.2d at 1373–74; Gantvoort v. Ranschau, 973 N.W.2d 225, 236 (S.D. 2022); Lambdin Funeral Serv., Inc. v. Griffith, 559 S.W.2d 791, 792 (Tenn. 1978).

55. *See, e.g.*, Cummins v. Heaney, No. 05 C 3396, 2005 WL 2171066, at *3 (N.D. Ill. Aug. 31, 2005) (applying Illinois law); Christakis v. Deitsch, 478 P.3d 241, 245 (Ariz. Ct. App. 2020); Horenstein, Nicholson & Blumenthal, L.P.A. v. Hilgeman, 178 N.E.3d 71, 104 (Ohio Ct. App. 2021).

56. *See, e.g.*, *Bennett*, 70 P.3d at 34.

57. *See, e.g.*, Kearney v. Foley & Lardner, LLP, 590 F.3d 638, 650 (9th Cir. 2009) (applying California law).

58. *See, e.g.*, Van Audenhove v. Perry, 217 Cal. Rptr. 3d 843, 849 (Ct. App. 2017).

59. *See, e.g.*, Loigman v. Twp. Comm. of Twp. of Middleton, 889 A.2d 426, 436 (N.J. 2006).

60. *See, e.g.*, La Jolla Grp. II v. Bruce, 149 Cal. Rptr. 3d 716, 728 (Ct. App. 2012); Exec. Excellence, LLC v. Martin Bros. Invs., LLC, 710 S.E.2d 169, 173–74 (Ga. Ct. App. 2011); Gorman-Dahm v. BMO Harris Bank, N.A., 94 N.E.3d 257, 262–64 (Ill. App. Ct. 2018).

61. *See, e.g.*, Winters v. Jones, No. 16-9020, 2018 WL 326518, at *7–8 (D.N.J. Jan. 8, 2018); Christonson v. United States, 415 F. Supp. 2d 1186, 1195 (D. Idaho 2006); Singh v. HSBC Bank USA, 200 F. Supp. 2d 338, 339–40 (S.D.N.Y. 2002).

62. *See, e.g.*, Divine Food & Catering, LLC v. W. Diocese of the Armenian Church of N. Am., 310 Cal. Rptr. 3d 476, 493 (Ct. App. 2023); Debrincat v. Fischer, 217 So. 3d 68, 70–71 (Fla. 2017); Simpson Strong-Tie Co. v. Stewart, Estes & Donnell, 232 S.W.3d 18, 26 (Tenn. 2007); Smith v. Chestnut Ridge Storage, LLC, 855 S.E.2d 332, 341 (W. Va. 2021).

63. *See, e.g.*, Quark, Inc. v. Harley, No. 96-1046, 1998 WL 161035, at *7 (10th Cir. Mar. 4, 1998) (involving breach of fiduciary duty under California law); Kolar v. Donahue, McIntosh & Hammerton, 52 Cal. Rptr. 3d 712, 718–19 (Ct. App. 2006) (alleging legal malpractice); Greenberg Traurig, LLP v. Frias Holding Co., 331 P.3d 901, 904 (Nev. 2014)

court,[64] criminal charges,[65] judicially imposed sanctions,[66] or professional discipline.[67] Courts are split on whether the litigation privilege applies to fraud claims.[68]

B. The Litigation Privilege Elements

The litigation privilege covers a lawyer's "communications preliminary to a proposed judicial proceeding," as well as communications "in the institution of, or during the course and as a part of, a judicial proceeding" in which the lawyer is participating as counsel, so long as the allegedly defamatory information has "some relation to the proceeding."[69] This Section briefly discusses these elements in turn.

1. Proposed Proceedings and Preliminary Matters

Whether an allegedly defamatory statement made before a lawsuit is filed falls within the scope of the litigation privilege is a recurring question.[70] Certainly, there does not need to be "an actual outbreak of

(concerning legal malpractice); Buchanan v. Leonard, 52 A.3d 1064, 1070 (N.J. Super. Ct. App. Div. 2012) (regarding legal malpractice).

64. *See* Herrera v. AllianceOne Receivable Mgmt., Inc., No. 14cv1844 BTM(WVG), 2015 WL 3796123, at *4–5 (S.D. Cal. June 18, 2015) (applying California law).

65. *See* State v. Brown, 217 N.E.3d 767, 775 (Ohio 2022).

66. *See* Wayson v. Stevenson, 514 P.3d 1263, 1278 (Alaska 2022); *In re* Marriage of Anka & Yeager, 242 Cal. Rptr. 3d 884, 890 (Ct. App. 2019); Bassichis v. Flores, 189 N.E.3d 640, 648–49 (Mass. 2022); *Simpson Strong-Tie Co.*, 232 S.W.3d at 26.

67. *See Bassichis*, 189 N.E.3d at 648; *Simpson Strong-Tie Co.*, 232 S.W.3d at 26.

68. *Compare* Madura v. Bank of Am., Inc., 767 F. App'x 868, 872–73 (11th Cir. 2019) (applying Florida's litigation privilege to fraudulent conduct during a judicial proceeding), *and* Heterich v. Peltner, 229 Cal. Rptr 3d 744, 750 (Ct. App. 2018) (extending the privilege to fraudulent statements made in furtherance of litigation), *and* Simms v. Seaman, 69 A.3d 880, 892 (Conn. 2013) (stating that the litigation privilege shields lawyers against fraud claims), *and Bassichis*, 189 N.E.3d at 650 (applying the litigation privilege to the lawyer's fraudulent misrepresentations to the court), *with* Matsuura v. E.I. du Pont de Nemours & Co., 73 P.3d 687, 700 (Haw. 2003) ("Under Hawaii law, a party is not immune from liability for civil damages based upon that party's fraud engaged in during prior litigation proceedings."), *and* N.Y. Cooling Towers, Inc. v. Goidel, 805 N.Y.S.2d 779, 783 (Sup. Ct. 2005) (explaining that the litigation privilege did not apply to the plaintiff's fraud claims because it is limited to defamation claims), *and* Moss v. Parr Waddoups Brown Gee & Loveless, 285 P.3d 1157, 1166 (Utah 2012) (asserting that the litigation privilege will not shield a lawyer against civil liability for fraud), *and* Smith v. Chestnut Ridge Storage, LLC, 855 S.E.2d 332, 341 (W. Va. 2021) (stating that the litigation privilege does not apply to fraud claims).

69. RESTATEMENT (SECOND) OF TORTS § 586 (AM. L. INST. 1977). *But see* Front, Inc. v. Khalil, 28 N.E.3d 15, 19 (N.Y. 2015) (holding that pre-litigation communications receive only a qualified privilege).

70. *See, e.g.*, Ralston v. Garabedian, 623 F. Supp. 3d 544, 592–94 (E.D. Pa. 2022) (explaining that a lawyer's allegedly defamatory letters were not protected by the litigation privilege because neither the lawyer nor his client seriously considered filing a lawsuit before sending the letters); Morass v. White, 571 F. Supp. 3d 77, 101 (S.D.N.Y. 2021) (footnote omitted) (concluding that the litigation privilege did not apply to a letter that "was

hostilities" for lawyers' communications preliminary to litigation to be privileged.[71] Rather, a judicial proceeding must be "contemplated in good faith and under serious consideration" for the privilege to attach.[72] Mere speculation about the prospect of a future judicial proceeding is not sufficient to invoke the litigation privilege.[73]

In determining whether litigation was contemplated in good faith and under serious consideration, courts focus on the lawyer's state of mind rather than on the client's.[74] The test is not whether the action will succeed, but whether it is being *contemplated* in good faith.[75] As a California court explained:

> It is important to distinguish between the lack of a good faith intention to bring a suit and publications which are made without a good faith belief in their truth, i.e., malicious publications. The latter, when made in good faith anticipation of litigation, are protected as part of the price paid for affording litigants the utmost freedom of access to the courts. This policy consideration is not advanced, however, when the person publishing an injurious falsehood is not seriously considering litigation . . . . No public policy supports extending a privilege to persons who attempt to profit from hollow threats of litigation.[76]

Whether litigation was contemplated in good faith and seriously considered is a question of fact.[77]

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not sent in anticipation of good faith litigation"); Atkinson v. Affronti, 861 N.E.2d 251, 254–58 (Ill. App. Ct. 2006) (concluding that a lawyer was protected by the litigation privilege for statements made in a letter sent in advance of contemplated litigation even though no lawsuit was ultimately filed).

71. Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc., 774 A.2d 332, 343 (D.C. 2001), *overruled on other grounds by* McNair Builders, Inc. v. Taylor, 3 A.3d 1132, 1142 (D.C. 2010).

72. Action Apt. Ass'n, Inc. v. City of Santa Monica, 163 P.3d 89, 102 (Cal. 2007); *see also* Martinez v. Hellmich L. Grp., P.C., 681 F. App'x 323, 328–29 (5th Cir. 2017) (applying Texas law); Borden v. Malone, 327 So. 3d 1105, 1116 (Ala. 2020) (quoting Barnett v. Mobile Cnty. Pers. Bd., 536 So. 2d 46, 52 (Ala. 1988)); Williams v. Lazer, 495 P.3d 93, 100 (Nev. 2021) (quoting Jacobs v. Adelson, 25 P.3d 1282, 1285 (Nev. 2014)).

73. *See* Harmon Law Offs., P.C. v. Att'y Gen., 991 N.E.2d 1098, 1106 (Mass. App. Ct. 2013).

74. *See Finkelstein, Thompson & Loughran*, 774 A.2d at 345.

75. *See* Visto Corp. v. Sproqit Techs., Inc., 360 F. Supp. 2d 1064, 1069 (N.D. Cal. 2005).

76. Fuhrman v. Cal. Satellite Sys., 231 Cal. Rptr. 113, 119 n.5 (Ct. App. 1986) (citation omitted), *disapproved on other grounds by* Silberg v. Anderson, 786 P.2d 365, 369 (Cal. 1990).

77. *See Action Apt. Ass'n*, 163 P.3d at 102; Dickinson v. Cosby, 225 Cal. Rptr. 3d 430, 455 (Ct. App. 2017).

2. Instituting, During, and as Part of Judicial Proceedings

Once litigation is under way, the privilege generally applies to all related statements by a lawyer, both in court and out.[78] The privilege also applies to communications that occur while a proceeding is temporarily stayed,[79] after a matter is heard but before a court issues a final ruling,[80] and after a case is settled but before necessary dismissal documents are filed.[81] The privilege applies to communications during the time that a judgment may be set aside or appealed.[82] As a rule, the litigation privilege even applies after a proceeding concludes.[83] There is substantial danger, however, that a lawyer's statements to the media will not be considered privileged because they are not seen as being made during the course of the judicial proceeding to which they relate.[84]

3. The Lawyer's Participation as Counsel

A lawyer's communications are not cloaked with the litigation privilege by the mere existence of a judicial proceeding.[85] The litigation

78. *See generally* Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co., 639 So. 2d 606, 608 (Fla. 1994) ("[W]e find that absolute immunity must be afforded to any act occurring during the course of a judicial proceeding."); Richard Wilson, *From Advocate to Defendant—Defenses for Lawyers Who Find Themselves in Litigation*, 61 S. TEX. L. REV. 43, 46 (2020) ("The privilege [] goes beyond utterances in court and filings with the court.").

79. *See, e.g.*, Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel, 151 P.3d 732, 753–54 (Haw. 2007) (applying the litigation privilege in an arbitration that was temporarily stayed).

80. *See, e.g.*, DeBry v. Godbe, 992 P.2d 979, 983–84 (Utah 1999) (concerning a letter written after the court had conducted a divorce trial but while the court still had the case under advisement).

81. *See, e.g.*, Impallomeni v. Meiselman, Farber, Packman, & Eberz, P.C., 708 N.Y.S.2d 459, 460 (App. Div. 2000) (involving a letter to a court reporter after the action was settled but before a stipulation of dismissal was entered or settlement funds were distributed).

82. *See, e.g.*, Malmin v. Engler, 864 P.2d 179, 182–83 (Idaho Ct. App. 1993) (discussing a letter written during the time that a default judgment could be set aside).

83. *See* Bedin v. Nw. Mem'l Hosp., 187 N.E.3d 739, 749 (Ill. App. Ct. 2021) (stating that the litigation privilege applies to communications made before, during, and after litigation).

84. *See* Aguirre v. Best Care Agency, Inc., 961 F. Supp. 3d 427, 456 (E.D.N.Y. 2013) ("The common law litigants' privilege does not cover out of court statements, such as those made in a press release or press conference, because they are not made during the course of judicial proceedings.").

85. *See* Diamond Resorts Int'l, Inc. v. Aaronson, 371 F. Supp. 3d 1088, 1111 (M.D. Fla. 2019) (stating that "[t]he mere existence of litigation" does not make every communication by a lawyer privileged (quoting Braxton Techs., LLC v. Ernandes, No. 6:09-cv-804-Orl-28GJK, 2010 WL 11623673, at *4 (M.D. Fla. Apr. 22, 2010))); *see, e.g.*, Cloonan v. Holder, 602 F. Supp. 2d 25, 31–32 (D.D.C. 2009) (determining that a lawyer's letter was not absolutely privileged because it was not clear what proceeding the letter related to and it was further unclear whether the lawyer participated in the proceeding as counsel).

privilege attaches to a lawyer's statements only if the lawyer "participates as counsel" in the proceeding.[86] In other words, the litigation privilege does not apply to allegedly tortious statements by lawyers who are not participating as counsel in a judicial proceeding.[87] Simply acting as a lawyer is no basis for invoking the privilege.[88] To participate as counsel for litigation privilege purposes, a lawyer must represent a party, potential party, or witness in the proceeding.[89]

4. Relation to the Proceeding

To be absolutely privileged, a lawyer's allegedly defamatory statement must also have "some relation to the proceeding."[90] Many courts rephrase this requirement, insisting that a communication must be "pertinent" or "relevant" to a judicial proceeding for the litigation privilege to attach.[91] Courts' use of the words "relevant" or "relevance" when discussing the relation between allegedly tortious communications and judicial proceedings is awkward because of the potential for confusion with the concept of evidentiary relevance. Certainly, the relation required for the litigation privilege to apply to a statement is not equated with the technical legal relevance required under rules of evidence.[92]

86. RESTATEMENT (SECOND) OF TORTS § 586 (AM. L. INST. 1977).

87. *See* Bouvier v. Porter, 865 S.E.2d 732, 744 (N.C. Ct. App. 2021).

88. *See* Oparaugo v. Watts, 884 A.2d 63, 81 (D.C. 2005).

89. *See id.* at 80–81 (declining to extend the privilege to the lawyer for a person who was not a party, potential witness, or witness in the underlying case).

90. RESTATEMENT (SECOND) OF TORTS § 586 (AM. L. INST. 1977).

91. *See, e.g.*, Pack v. Middlebury Cmty. Schs., 990 F.3d 1013, 1023 (7th Cir. 2021) ("The touchstone for the privilege is pertinence . . . "); Bedin v. Nw. Mem'l Hosp., 187 N.E.3d 739, 749 (Ill. App. Ct. 2021) (discussing the "pertinency" requirement); Miller v. Reinert, 839 N.E.2d 731, 735 (Ind. Ct. App. 2005) (discussing whether statements in an appellate brief were "pertinent and relevant" to the case); Stilger v. Flint, 391 S.W.3d 751, 754 (Ky. 2013) ("When statements are made as a pertinent part of a judicial proceeding there is no question that they enjoy absolute privilege."); Oesterle v. Wallace, 725 N.W.2d 470, 474 (Mich. Ct. App. 2006) (asserting that lawyers' statements are privileged "if they are relevant, material, or pertinent to the issue being tried"); Provencher v. Buzzell-Plourde Assocs., 711 A.2d 251, 255 (N.H. 1998) (stating that the privilege applies if statements "are pertinent or relevant" to judicial proceedings); Denson v. Donald J. Trump for President, Inc., 116 N.Y.S.3d 267, 276 (App. Div. 2020) (stating that the privilege applies to statements that "are material and pertinent to the issues involved" in the litigation); Andrews v. Elliot, 426 S.E.2d 430, 433 (N.C. Ct. App. 1993) (stating that the privilege applies when a communication is "relevant" to litigation); Reister v. Gardner, 174 N.E.3d 714, 715 (Ohio 2020) (explaining that the litigation privilege applies to statements that are "relevant to judicial proceedings"); Bochetto v. Gibson, 860 A.2d 67, 73 (Pa. 2004) (stating that communication must be "pertinent and material" for the litigation privilege to apply); Young v. Rayan, 533 P.3d 123, 129 (Wash. Ct. App. 2023) ("Litigation privilege therefore prohibits liability stemming from statements (1) made in the course of a judicial proceeding (2) that are pertinent to the litigation.").

92. *See* Thomas v. Ford Motor Co., 137 F. Supp. 2d 575, 586 (D.N.J. 2001); *see also* Woodruff v. Trepel, 725 A.2d 612, 618 (Md. Ct. Spec. App. 1999) ("The test for determining whether a statement qualifies for the privilege is not the evidentiary relevance

All that is necessary for a communication to bear some relation to a proceeding "is a minimal possibility of pertinence or the simplest rationality."[93] When the issue is phrased as whether a statement is pertinent to a proceeding, the determination of pertinency is likewise a low bar.[94] Finally, courts should resolve any doubts about whether a statement is related to judicial proceedings in favor of applying of the privilege.[95]

III. ATTORNEY IMMUNITY

Regardless of whether the litigation privilege applies to a lawyer's communications in a given case, a lawyer owes no duty of care to a client's adversary.[96] A lawyer is generally not liable for damage or harm to a third person arising out of the lawyer's representation of a client.[97] The general rule that lawyers are not liable to third parties for alleged malfeasance while representing clients owes to lawyers' fiduciary duties to their clients and the public policy that lawyers must be able to discharge their fiduciary duties by employing procedures, strategies, or tactics that are necessary to capably represent their clients without concern for personal liability.[98] Or, as the Wisconsin Supreme Court has explained:

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test."); Elbert v. Young, 977 N.W.2d 892, 900 (Neb. 2022) (footnote omitted) ("The relevancy of the defamatory matter is not a technical legal relevancy but instead a general frame of reference and relationship to the subject matter of the action.").

93. Mosesson v. Jacob D. Fuchsberg Law Firm, 683 N.Y.S.2d 88, 89 (App. Div. 1999).

94. *See Young*, 533 P.3d at 129 ("[T]he determination of pertinency is not a high bar."); *see also* Bedin v. Nw. Mem'l Hosp., 187 N.E.3d 739, 749 (Ill. App. Ct. 2021) ("[T]he pertinency requirement is not strictly applied."); Weinstock v. Sanders, 42 N.Y.S.3d 205, 208 (App. Div. 2016) ("The test of pertinency to the litigation is extremely liberal . . . .").

95. *See* McNair v. City & Cnty. of S.F., 210 Cal. Rptr. 3d 267, 274 (Ct. App. 2016); Begley & Hirsch Revocable Tr. v. Ireson, 490 P.3d 963, 972 (Colo. App. 2021) (quoting Club Valencia Homeowners v. Valencia Assocs., 712 P.2d 1024, 1027–28 (Colo. App. 1985)); *Bedin*, 187 N.E.3d at 749; Mahoney & Hagberg v. Newgard, 729 N.W.2d 302, 306–07 (Minn. 2007) (quoting Jenson v. Olson, 141 N.W.2d 488, 490 (Minn. 1966)); Williams v. Kenney, 877 A.2d 277, 288 (N.J. Super. Ct. App. Div. 2005); Daystar Residential, Inc. v. Collmer, 176 S.W.3d 24, 28 (Tex. App. 2004).

96. *See* Seiller Waterman, LLC v. RLB Props., Ltd., 610 S.W.3d 188, 201 (Ky. 2020); Lamare v. Basbanes, 636 N.E.2d 218, 219 (Mass. 1994).

97. *See* 1 RONALD E. MALLEN, LEGAL MALPRACTICE § 6:1, at 617 (2023); *see also* Maness v. Star-Kist Foods, Inc., 7 F.3d 704, 709 (8th Cir. 1993) ("[A]n attorney who acts within the scope of the attorney-client relationship will not be liable to third persons for actions arising out of his professional relationship unless the attorney exceeds the scope of his employment or acts for personal gain."); MacLeish v. Boardman & Clark LLP, 924 N.W.2d 799, 804 (Wis. 2019) ("Generally, an attorney cannot be held liable to a third party for any act committed within the scope of the attorney-client relationship.").

98. *See* Sheffield v. Matlock, 587 S.W.3d 723, 729 (Mo. Ct. App. 2019) (quoting Macke Laundry Serv. Ltd. P'ship v. Jetz Serv. Co., 931 S.W.2d 166, 177 (Mo. Ct. App. 1996)).

> This rule serves to protect the attorney-client relationship. To extend an attorney's liability to third parties not in privity with the attorney may create damaging effects on the defendant attorney's relationship with the client. "That is, if an attorney must be responsible not only to his or her own client but also to a third-party nonclient, a potential conflict of interest may be inevitable, thus impairing an attorney's ethical obligations to represent his or her own client zealously within the bounds of the law."[99]

The rule that lawyers are generally not liable to third parties for conduct during clients' representations has become known as "attorney immunity."[100]

The law of attorney immunity has, at least of late, been most richly developed in Texas, where the doctrine protects a lawyer against a third party's (that is, a non-client's) claim predicated on conduct by the lawyer that:

> (1) constitutes the provision of "legal" services involving the unique office, professional skill, training, and authority of an attorney *and* (2) the attorney engages in to fulfill the attorney's duties in representing the client within an adversarial context in which the client and the non-client do not share the same interests and therefore the non-client's reliance on the attorney's conduct is not justifiable.[101]

The application of attorney immunity generally depends on whether a lawyer's alleged misconduct is of the kind described immediately above rather than on the nature of its supposed wrongfulness.[102] So, if a lawyer engages in conduct that is foreign to the duties of a lawyer or that falls outside the scope of a client's representation, attorney immunity does not apply.[103] A lawyer's failure to establish that the misconduct for which she is being sued was within the scope of the client's representation will certainly defeat attorney immunity.[104] The scope of representation requirement is essential because attorney immunity rests on the

99. *MacLeish*, 924 N.W.2d at 804 (citation omitted) (quoting Green Springs Farms v. Kersten, 401 N.W.2d 816, 826 (Wis. 1987)); *see also* Estate of Cabatit v. Canders, 105 A.3d 439, 446 (Me. 2014) ("An attorney will never owe a duty of care to a nonclient . . . if that duty would conflict with the attorney's obligations to his or her clients.").

100. *See* Haynes & Boone, LLP v. NFTD, LLC, 631 S.W.3d 65, 78 (Tex. 2021). This rule is also known as the "agent immunity defense." MALLEN, *supra* note 97, § 6:1, at 617.

101. *Haynes & Boone*, 631 S.W.3d at 78.

102. *See id.*

103. *See* Taylor v. Tolbert, 644 S.W.3d 637, 646 (Tex. 2022).

104. *See, e.g.*, Kelly v. Nichamoff, 868 F.3d 371, 375 (5th Cir. 2017) (explaining that the lawyer failed to establish that his alleged misconduct occurred within the scope of his representation of the plaintiff).

proposition that a lawyer acting within the scope of a client's representation is acting on the client's behalf rather than her own.[105]

Consistent with the scope of representation requirement, attorney immunity does not shield lawyers against all liability to third parties.[106] For instance, lawyers are not protected by immunity if they participate in clients' fraudulent business schemes.[107] To use another example, attorney immunity does not apply to malicious prosecution claims.[108] And even when a lawyer may avoid liability to a third party based on attorney immunity, the lawyer may be subject to sanctions, contempt charges, or professional discipline.[109]

The attorney immunity doctrine may also be described as a qualified privilege against liability. The principles are essentially the same even if the nomenclature differs. In *Reynolds v. Schrock*, for example, the Oregon Supreme Court held that a lawyer acting on a client's behalf and within the scope of the attorney-client relationship was protected by a "privilege" and thus was not liable for advising his client in connection with the client's alleged breach of the client's fiduciary duty to another landowner.[110] In fact, Oregon courts appear to use the terms "privilege" and "immunity" interchangeably in the context of lawyers' liability to third parties.[111]

A lawyer's privilege to practice, as constructed by the *Reynolds* court, is limited to advice or assistance within "the scope of the lawyer-client relationship or the assistance that a lawyer properly provides for a client."[112] The privilege does not shield a lawyer who engages in criminal

105. *See* Hager v. McCabe, Trotter & Beverly, P.C., 869 S.E.2d 886, 889 (S.C. Ct. App. 2022).

106. *See* Miller v. Stonehenge/Fasa-Tex., JDC, LLP, 993 F. Supp. 461, 464 (N.D. Tex. 1998) ("[T]he rule does not provide absolute immunity for every tort committed by a lawyer, however tangentially related to her professional role."); Landry's, Inc. v. Animal Legal Def. Fund, 631 S.W.3d 40, 47 (Tex. 2021) ("Not just any action taken when representing a client qualifies for immunity . . . ."); Bethel v. Quilling, Selander, Lownds, Winslett, & Moser, P.C., 595 S.W.3d 651, 657 (Tex. 2020) ("[A]ttorney immunity is not boundless.").

107. *See Bethel*, 595 S.W.3d at 657.

108. *See* Stafford v. Muster, 582 S.W.2d 670, 679 n.5 (Mo. 1979).

109. *See Bethel*, 595 S.W.3d at 658.

110. *See* Reynolds v. Schrock,142 P.3d 1062, 1069 (Or. 2006).

111. *See, e.g.*, Padrick v. Lyons, 372 P.3d 528, 535 (Or. Ct. App. 2016). In *Padrick*, the court characterized the privilege recognized in *Reynolds* as a form of immunity:

> Alternatively, the court concluded that any alleged misconduct by Keillor could not provide a basis for defendants' joint liability as a matter of law, because . . . defendants' acts occurred within the scope of a lawyer-client relationship, which, under *Reynolds v. Schrock*, . . . is subject to *immunity*."

Id. (emphasis added).

112. *Reynolds*, 142 P.3d at 1071.

or fraudulent conduct or who engages in some form of self-interested behavior that falls outside the scope of the client's representation.[113]

IV. APPLYING THE LITIGATION PRIVILEGE AND ATTORNEY IMMUNITY IN PRACTICE

Although the litigation privilege may apply to lawyers' media activities, it more likely will not, and the application of attorney immunity is even more doubtful. This Part examines illustrative cases, including the separate category of class and collective actions, and analyzes courts' differing approaches.

A. Courts Rejecting the Litigation Privilege and Attorney Immunity When Lawyers are Sued for Their Media Activities

1. The Texas Supreme Court's Approach in *Landry's*

Most state courts that have considered the issue have declined to find that lawyers' communications with the media are protected by the litigation privilege.[114] For example, in *Landry's, Inc. v. Animal Legal Defense Fund,* the court rejected the litigation privilege as a defense to various tort claims arising out of a law firm's publicity campaign ahead of planned litigation.[115] *Landry's* is also the rare reported case in which the court considered (and rejected) attorney immunity in the context of lawyers' media activities.[116]

Hospitality conglomerate Landry's, Inc. ("Landry's") owned Houston Aquarium, Inc., which, in turn, ran the Downtown Aquarium in Houston.[117] The aquarium housed four white Bengal tigers.[118] In March 2015, Cheryl Conley, a local radio station owner, asked Landry's for a private tour of the aquarium's tiger habitat.[119] Landry's went along and permitted her to photograph the tigers and their living conditions.[120] Landry's representatives also answered her questions about the tigers.[121]

113. *See id.* at 1071–72; *see, e.g.*, Cruze v. Hudler, 267 P.3d 176, 183 (Or. Ct. App. 2011) (explaining that the privilege did not shield the lawyer against a common law fraud claim or a claim that he acted in concert to defraud the plaintiffs).

114. *See* Jacobs v. Adelson, 325 P.3d 1282, 1286 (Nev. 2014) (stating that most states have held that the absolute litigation privilege does not apply when communications are made to the media and collecting related cases).

115. *See* Landry's, Inc. v. Animal Legal Defense Fund, 631 S.W.3d 40, 44, 46–51 (Tex. 2021).

116. *See id.* at 44, 51–53.

117. *See id.* at 44.

118. *See id.*

119. *See id.*

120. *See id.*

121. *See id.*

Conley never aired a story about the tigers on her radio station; instead, she contacted the Animal Legal Defense Fund ("ALDF").[122] ALDF is an animal rights group founded by lawyers that operates as a private law firm with the goal of advancing animal rights through legal action.[123]

In September 2016, ALDF lawyer Carney Anne Nasser sent Landry's a 60-day notice of intended suit, as is required when a party is planning litigation under the Endangered Species Act's ("ESA") citizen-suit provision.[124] The notice letter alleged that the aquarium's tiger habitat violated the ESA and aspects of the Association of Zoos and Aquariums' tiger care manual.[125] In addition to Landry's, ALDF sent copies of Carney's notice letter to the Secretary of the Interior, as required by the ESA, and the Houston mayor.[126]

ALDF simultaneously posted a press release on its website that described the notice letter and linked to it and which disparaged the tigers' living conditions.[127] ALDF also sent copies of the press release and notice letter to the Houston Chronicle and to ABC-Denver7, a TV station in Denver, where Landry's had another tiger exhibit.[128] Those efforts generated the publicity ALDF surely hoped for when the Houston Chronicle printed a story with the headline, "Animal rights group threatens to sue Landry's over tigers at Downtown Aquarium," and ABC-Denver7 posted an article titled, "Downtown Aquarium owners, Landry's, facing possible lawsuit over tigers at Houston location."[129] In addition, a website called The Dodo posted an article under the headline, "White Tigers Stuck In Aquarium Haven't Felt The Sun In 12 Years."[130] At around the same time, ALDF created five Facebook posts about the tigers, and Nasser and ALDF's executive director, Stephen Wells, tweeted about the big cats.[131]

In November 2016, right before the ESA's 60-day notice period expired, Landry's sued Nasser, ALDF, and Conley for abuse of process, business disparagement, civil conspiracy, defamation, tortious interference, and trespass.[132] Landry's sought both actual and exemplary damages, declaratory relief, retraction of the defendants' allegedly defamatory statements, and an injunction barring the defendants from

122. *See id.*
123. *See id.*
124. *See id*.
125. *See Landry's*, 631 S.W.3d at 44.
126. *See id.*
127. *See id.*
128. *See id.*
129. *Id.* at 44–45.
130. *Id.* at 45.
131. *See id.*
132. *See id.*

"further defaming or disparaging" the company.[133] The defendants prevailed in the trial court, and Landry's appealed.[134] The Texas Court of Appeals held that the litigation privilege, which Texas courts describe as the "judicial-proceedings privilege," shielded the defendants from liability for their allegedly tortious statements.[135] In so holding, the court of appeals concluded that the defendants' statements were absolutely privileged because they were related to ALDF's planned lawsuit, which was "actually contemplated in good faith" when the statements were published.[136] Landry's successfully sought review by the Texas Supreme Court on several issues, the critical one being whether Nasser and ALDF were shielded from liability by the judicial-proceedings privilege or by attorney immunity.[137]

The Texas Supreme Court began its analysis by noting that "[t]he 'judicial-proceedings privilege' and 'attorney immunity' are 'independent defenses serving independent purposes.'"[138] Under the judicial-proceedings privilege, statements made "in the due course of a judicial proceeding" will not support defamation claims regardless of whether the statements were negligent or malicious.[139] Statements made in "serious contemplation" of litigation are deemed to be made in the due course of a judicial proceeding.[140] While frequently invoked in defamation cases, the judicial-proceedings privilege repels all tort claims based on the content of the offending communication.[141]

In comparison, attorney immunity is a broad affirmative defense that protects lawyers against liability to third parties in recognition of the settled principle that lawyers must be free "to practice their profession, to advise their clients and interpose any defense or supposed defense, without making themselves liable for damages."[142] Although attorney immunity substantially overlaps with the judicial-proceedings privilege, attorney immunity is not simply lawyers' version of the privilege.[143] Attorney immunity fundamentally ensures loyal and zealous representation by

133. *Id.*
134. *See id.*
135. *Landry's*, 631 S.W.3d at 45.
136. *Id.* (quoting Landry's, Inc. v. Animal Legal Def. Fund, 566 S.W.3d 41, 58–60 (Tex. App. 2018), *aff'd in part, rev'd in part*, 631 S.W.3d 40, 55 (Tex. 2021)).
137. *See id.*
138. *Id.* at 46 (quoting Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 485 n.12 (Tex. 2015)).
139. *Id.* (quoting James v. Brown, 637 S.W.2d 914, 916 (Tex. 1982)).
140. *Id.* (quoting *Cantey Hanger*, 467 S.W.3d at 485 n.12).
141. *See id.* (citing Collins v. Zolnier, No. 09-17-00418-CV, 2019 WL 2292333, at *3 (Tex. App. May 30, 2019)).
142. *Id.* at 47 (quoting *Cantey Hanger*, 467 S.W.3d at 481).
143. *See id.*

lawyers serving as clients' advocates.[144] But the doctrine has limits.[145] For immunity to attach, a lawyer must be acting in the unique capacity "of one who possesses 'the office, professional training, skill, and authority of an attorney.'"[146]

The *Landry's* court observed that lower Texas courts were divided on whether the judicial-proceedings privilege applied to statements by lawyers who publicized their client's allegations in the media.[147] Ultimately, the Texas Supreme Court sided with the lower courts that had declined to extend the privilege to lawyers' litigation of their clients' cases in the press.[148] In adopting that position, the *Landry's* court focused on the purpose of the privilege:

> The judicial-proceedings privilege exists to facilitate the proper administration of the justice system. It does so by relieving the participants in the judicial process from fear of retaliatory lawsuits for statements they make in connection with the proceeding itself. Statements to the media, by definition, are not made within a judicial proceeding. They are not directed to the court or the opposing party, and they play no formal role in the adjudicatory process.[149]

While the judicial-proceedings privilege certainly covers pre-suit communications, the condition that a statement "bear 'some relation to a proceeding'" to be privileged is not so elastic as to include statements intended to generate publicity that address the same subject matter as the lawsuit "but serve no purpose within the suit."[150] In other words, to be privileged, the allegedly tortious statement itself must relate to a proceeding; it is not enough for the subject matter of the statement to relate to a proceeding.[151]

Although media releases are often important to the issuing party and may perform a public service, they are neither part of a judicial proceeding nor preliminary to one in any formal sense.[152] However valuable accurate public knowledge of pending or planned judicial proceedings may be, the court considered that benefit to be adequately protected by the First Amendment and the many other defenses available in defamation law.[153] In contrast, the judicial-proceedings privilege aims to facilitate zealous

144. *See id.* (quoting *Cantey Hanger*, 467 S.W.3d at 481).
145. *See Landry's*, 631 S.W.3d at 47 ("Not just any action taken when representing a client qualifies for immunity . . . .").
146. *Id.* (quoting *Cantey Hanger*, 467 S.W.3d at 482).
147. *See id.* at 48.
148. *See id.*
149. *Id.* (citation omitted).
150. *Id.* at 49 (quoting Shell Oil Co. v. Writt, 464 S.W.3d 650, 655 (Tex. 2015)).
151. *See id.*
152. *See id.*
153. *See id.*

litigation in court—not to publicize a party's position out of court or foster public awareness.[154] The *Landry's* court reasoned that extending the privilege to public relations efforts around litigation would lift the privilege from its foundation and allow parties who publicize defamatory allegations to avoid liability merely because they pleaded similar claims.[155]

The *Landry's* court agreed with the court of appeals that sending the notice letter to Landry's and the Secretary of the Interior was protected by the judicial-proceedings privilege because those communications were prerequisites for the planned lawsuit.[156] But ALDF and Nasser crossed the line when they circulated the notice letter and press release to the media, crafted blog posts, and took to social media.[157] Those activities were not protected by the judicial-proceedings privilege, and the court of appeals erred when it relied on the privilege to affirm the trial court's dismissal of Landry's suit.[158]

The court next turned to Nasser's and ALDF's attorney immunity defense.[159] While the notice letter and delivery of the letter to Landry's and the Secretary of the Interior constituted "lawyerly work for a client involving 'the office, professional training, skill, and authority of an attorney,'" the defendants' publicity campaign did not.[160] "Anyone—including press agents, spokespersons, or someone with no particular training or authority at all—can publicize a client's allegations to the media, and they commonly do so without the protection of immunity."[161] To be sure, lawyers also advocate their clients' causes in the media, but that does not alone entitle them to immunity, nor do they enjoy immunity when they have simply concluded that publicity will advance the client's representation.[162] Thus, Nasser's and ALDF's social media activities were not cloaked with attorney immunity.[163] Although tweets and Facebook posts publicizing a client's claims may promote a client's public relations goals, they "are not the actions of lawyers acting in the lawyerly capacity to which immunity attaches."[164] Nor do such activities reflect the normal

154. *Id.*

155. *See Landry's*, 631 S.W.3d at 49 (quoting De Mankowski v. Ship Channel Dev. Co., 300 S.W. 118, 122 (Tex. App. 1927)).

156. *See id.* at 50 (quoting RESTATEMENT (SECOND) OF TORTS § 586 cmt. a (AM. L. INST. 1977)).

157. *See id.*

158. *See id.* at 51.

159. *See id.*

160. *Id.* at 51–52 (quoting Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 482 (Tex. 2015)).

161. *Id.* at 52.

162. *See id.*

163. *See id.*

164. *Id.*

"discharge of [] lawyers' duties" in client representation.[165] Moreover, recognizing attorney immunity in situations such as this would create broader doctrinal problems:

> If attorney immunity protected attorneys for out-of-court republication of defamatory allegations made in a lawsuit, many of the lines carefully drawn by the judicial-proceedings privilege would be erased. The judicial-proceedings privilege deals specifically with statements connected to litigation. Within that realm, the judicial-proceedings privilege distinguishes between statements within the litigation and statements outside of it. The former are generally privileged, while the latter generally are not. Yet if attorney immunity protected all litigation-related statements by lawyers—whether the statements are made within litigation or not—there would be little need to police the boundaries of the judicial-proceedings privilege. The distinction the privilege draws between in-court and out-of-court statements would be a dead letter if any out-of-court statement thought by the lawyer to advance his client's interests enjoyed the absolute shield of attorney immunity. We decline to take so broad a view of attorney immunity.[166]

After addressing some additional issues, the Texas Supreme Court concluded that neither the judicial-proceedings privilege nor attorney immunity barred Landry's defamation claims.[167] It therefore remanded the case to the court of appeals to consider those claims.[168]

2. No Privilege in North Carolina for Press Conference Statements

The lawyers in *Landry's* widely publicized their case in the media, but they never held a press conference. In *Topping v. Meyers*, the North Carolina Court of Appeals was asked to decide whether the litigation privilege applied to a lawyer's statements in a press conference reporting the findings of the lawyer's internal investigation and the resulting lawsuit against an organization's former CEO.[169]

Richard Topping was CEO of Cardinal Innovations Healthcare Solutions ("Cardinal"), which was regulated by the North Carolina

165. *See Landry's, Inc.*, 631 S.W.3d at 52–53 (quoting *Cantey Hanger*, 467 S.W.3d at 481).

166. *Id.* at 53 (footnotes omitted).

167. *See id.* at 55.

168. *See id.* at 55–56.

169. *See* Topping v. Meyers, 842 S.E.2d 95, 98 (N.C. Ct. App. 2020). Organizations of all types hire lawyers to conduct internal investigations of alleged wrongdoing by employees and constituents. *See* Douglas R. Richmond, *Navigating the Lawyering Minefield of Internal Investigations*, 63 VILL. L. REV. 617, 617–18 (2018). From investigating lawyers' perspective, defamation claims are an obvious associated risk. *See id.* at 678 (footnote omitted) ("[I]nternal investigations almost invite defamation claims against the inquiring lawyers.").

Department of Health and Human Services. ("DHHS").[170] In May 2017, DHHS investigated Cardinal's operations.[171] The resulting report denounced the severance provisions in Topping's employment contract, as well as Topping's compensation and bonuses.[172] In November 2017, Topping and three other senior Cardinal executives left Cardinal as a result of the DHHS report.[173] Topping received $1.7 million in severance pay.[174] DHHS then assumed Cardinal's operations, replaced its board of directors, and installed a new board (the "Board").[175] In January 2018, the Board hired Kurt Meyers of the law firm McGuireWoods LLP to probe Topping's role in drafting and approving his severance agreement and payments and those of the other departed Cardinal executives.[176]

Meyers presented his findings to the Board in March 2018.[177] The Board voted to sue Topping to recover his severance payment based on his supposed misconduct revealed in Meyers's investigation.[178] The Board also planned a press conference to be held after the lawsuit was filed, during which Meyers would publicize the findings of his investigation and allegations in the complaint.[179] Meyers conducted the press conference just days later and less than two hours after filing the lawsuit against Topping.[180]

In response, Topping sued Meyers and McGuireWoods for libel per se, slander per se, negligent infliction of emotional distress, negligence, and punitive damages.[181] The defendants moved to dismiss his complaint based on the litigation privilege, but the trial court denied their motion.[182] Meyers and McGuireWoods then took an interlocutory appeal to the North Carolina Court of Appeals.[183]

North Carolina courts apply the litigation privilege as formulated in the Restatement (Second) of Torts.[184] Under North Carolina law, lawyers'

170. *See Topping*, 842 S.E.2d at 98.
171. *See id.*
172. *See id.*
173. *See id.*
174. *See id.*
175. *See id.*
176. *See id.*
177. *See id.*
178. *See id.*
179. *See id.*
180. *See Topping*, 842 S.E.2d at 98.
181. *See id.*
182. *See id.*
183. *See id.*
184. *See id.* at 101 (quoting Jones v. Coward, 666 S.E.2d 877, 879 (N.C. Ct. App. 2008)); *see also* RESTATEMENT (SECOND) OF TORTS § 586 (AM. L. INST. 1977). The Restatement test is phrased 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

statements are held to have been made in the course of a judicial proceeding and are thus privileged if: (1) they are made to a court presiding over litigation or are submitted to a government agency conducting an administrative hearing; and (2) the statements are pertinent or relevant to the litigation or hearing.[185] In contending that Meyers's remarks at the press conference were protected by the litigation privilege, Meyers and McGuireWoods pointed the court to a series of cases in which North Carolina courts had interpreted the judicial proceedings requirement to encompass more than trials.[186] But these cases represented "small and incremental steps" in extending the litigation privilege "beyond the protected core of in-court speech," such as applying the privilege to pleadings and other documents filed in judicial proceedings, lawyers' exchanges with potential witnesses when preparing cases, and out-of-court statements between parties or lawyers during litigation or preliminary to planned litigation.[187] These cases did not help the defendants, however, because the cases all logically and practically furthered the core purpose of the litigation privilege.[188] In contrast, Meyers and McGuireWoods had not shown that extending the litigation privilege to a lawyer's statements at a press conference would further the privilege's core purpose: to promote the proper and efficient administration of justice by liberating participants in the judicial process from the fear of defamation suits.[189] According to the *Topping* court, current North Carolina law suitably protected parties, lawyers, and judges from the fear of defamation suits predicated on their communications.[190] A press conference, however, "is not communication between the parties, their counsel, nor with or concerning the court."[191] As the court further elaborated:

> Absolute privilege appropriately protects statements asserted in a pleading filed with the trial court and invoking judicial process. Statements made outside the proceeding to the public or media representatives at a press conference, even those averments that "mirror" allegations made in a filed complaint, deviate from and stray too far beyond the core and "occasion" of speech to invoke immunity from suit. Such immunity cannot be justified by asserted public interest beyond encouraging frankness and protecting testimony,

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> judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

RESTATEMENT (SECOND) OF TORTS § 586.

185. *See Topping*, 842 S.E.2d at 101 (quoting Burton v. NCNB Nat'l Bank of N.C., 355 S.E.2d 800, 802 (N.C. Ct. App. 1987)).

186. *See id.* at 103.

187. *Id.* (citing multiple cases as examples).

188. *See id.*

189. *See id.* (quoting *Jones*, 666 S.E.2d at 879).

190. *See id.*

191. *Id.*

> communications between counsel *inter se* or with the court, and participation within the judicial proceeding.
>
> A press conference is neither an inherent nor critical component of a judicial proceeding. To hold otherwise would enable any litigant to file barratrous or sanctionable pleadings containing scurrilous, false, or defamatory language, then immediately convene a press conference outside the courthouse to further disseminate and re-publish those otherwise defamatory statements, while asserting immunity from challenge or to being answerable in court.[192]

Construing the litigation privilege narrowly as required by North Carolina law, the *Topping* court reasoned that the concern of chilling speech by allowing possible defamation suits against lawyers or litigants is not so great as to extend the absolute litigation privilege to statements made at press conferences amidst litigation.[193] Lawyers and parties who conduct press conferences during judicial proceedings may have other defenses to claims against them and they are not necessarily liable for their statements in any event, but they cannot avoid liability by invoking the litigation privilege.[194]

In summary, the occasion or venue for Meyers's statements easily tipped the scales against recognizing the litigation privilege.[195] Statements at a press conference are simply "too far afield" to fall within the course of a judicial proceeding for litigation privilege purposes.[196] Accordingly, the *Topping* court dismissed the defendants' appeal and remanded the case to the trial court for further proceedings.[197]

3. Excessive Publication Dooms the Defendants' Absolute Privilege

Pratt v. Nelson arose out of Mary Ann Nelson's horrific tale of being forced by her father, Daniel Kingston, to marry her uncle, David Kingston, when she was a teenager and her subsequent life in a polygamous cult known as the Order or the Kingston organization.[198] Nelson sued hundreds of defendants, including Nevin and Denise Pratt, in a Utah court.[199] In her complaint (described as the "Kingston Complaint"), Nelson alleged that a group of defendants known as Order Members, which included the Pratts,

192. *Id.* at 103–04 (citations omitted).
193. *See id.* at 104.
194. *See id.*
195. *See Topping*, 842 S.E.2d at 104.
196. *Id.* at 106.
197. *See id.*
198. *See* Pratt v. Nelson, 164 P.3d 366, 370–71 (Utah 2007).
199. *See id.* at 370.

enabled her sexual abuse, assault, battery, and false imprisonment by Kingston organization members.[200]

A few weeks after filing the Kingston Complaint, Nelson and her lawyers held a press conference to which they invited members of the Utah local media and Associated Press reporters.[201] "[T]he press conference made local, national, and international news, reaching various media throughout the world via newspaper, television, and the internet."[202] At the press conference, Nelson and at least two of her lawyers spoke about the defendants named in the Kingston Complaint.[203] They never mentioned the Pratts by name, but instead referred generally to the Kingston organization and the Order.[204] Nelson's lawyers also gave copies of the Kingston Complaint and Nelson's prepared written statement to reporters who attended the press conference.[205] Finally, one of Nelson's lawyers told the assembled reporters that the individual defendants named in the Kingston Complaint "were 'the key members of the Kingston organization' and that the Nelsons were trying to punish and 'make an example of them.'"[206]

The Pratts sued Nelson and her lawyers (described collectively as "the Nelsons" by the *Pratt* court) for defamation.[207] The Nelsons prevailed in the trial court and at the Utah Court of Appeals.[208] The Pratts successfully sought review by the Utah Supreme Court.[209]

The *Pratt* court explained that it first had to determine whether the "judicial proceeding privilege" applied to the Nelson's statements at the press conference, including the Kingston Complaint, Nelson's prepared statement, and the lawyers' comments.[210] Then, if it found that the

200. *See id.*
201. *See id.* at 371.
202. *Id.*
203. *See id.*
204. *See id.*
205. *See id.* Nelson's prepared statement said:

> I was raised in the Kingston Polygamist Family. I escaped when I was 16 years old. I am pursuing this lawsuit with the hope that other young girls and boys in the same position that I was in will see that the leaders of the Kingston Organization are not above the law, even though they tell us that they are, that they can be punished for what they do to us, and that we can escape and seek recovery for the harm that was done to us. I also hope that the people that we are bringing this lawsuit against will realize the harm they have caused and continue to cause, and that they will change their ways.

Id. at 371 n.2.
206. *Id.*
207. *Id.*
208. *See Pratt*, 164 P.3d. at 371–72.
209. *See id.* at 372.
210. *Id.* at 375.

privilege applied, it would decide whether the Nelsons lost the absolute privilege through excessive publication of the various statements.[211]

The court easily concluded that the Kingston Complaint was protected by the judicial proceeding privilege.[212] It was doubtful, however, whether Nelson's prepared statement and the lawyers' statements at the press conference could qualify as having been made in the course of a judicial proceeding.[213] And even if Nelson's prepared statement and the lawyers' statements at the press conference might have been protected by the judicial proceeding privilege, they may have lost their privileged status through excessive publication.[214] In deciding whether the Nelsons lost their absolute privilege through excessive publication, the court focused on two factors: (1) whether the recipients of the publication were sufficiently connected to the litigation; and (2) whether protecting the publication would further the purpose of the judicial proceeding privilege.[215]

With respect to the first factor, the *Pratt* court held that members of the media generally lack a connection to judicial proceedings sufficient to justify extending the judicial proceeding privilege to statements made to them by parties.[216] So it was here.[217] The Nelsons' statements to the press were published to more people than necessary to resolve the litigation or further its objectives.[218] Reporters who attended the press conference had no relation to the litigation or any apparent legal interest in its outcome.[219] At most, journalists who came to the press conference were acting merely as concerned citizens.[220] They certainly played no authorized role in resolving the parties' dispute.[221]

Next, the court considered the purpose of the judicial proceeding privilege, which is to promote the integrity of the judicial proceeding and the search for truth[222] and to encourage candid and transparent communication between the parties and their lawyers in order to resolve disputes.[223] The court emphasized that parties' or lawyers' statements to the press do little or nothing to promote the search for truth.[224] Moreover,

211. *See id.*
212. *See id.* at 376.
213. *See id.* at 377.
214. *See id.*
215. *See id.*
216. *See id.*
217. *See id.*
218. *See Pratt*, 164 P.3d at 380.
219. *See id.*
220. *See id.*
221. *See id.*
222. *See id.* at 381 (quoting DeBry v. Godbe, 992 P.2d 979, 983 (Utah 1999)).
223. *See id.* (quoting Krouse v. Bower, 20 P.3d 895, 901 (Utah 2001)).
224. *See id.*

parties' or lawyers' statements to the media often discourage, rather than encourage, dispute resolution.[225] In short, the court was unwilling to consider statements to the media as having been made in the course of a judicial proceeding especially when, as here, a party convened a press conference with the goal of widely disseminating information about her case.[226]

In conclusion, the *Pratt* court held that the Nelsons' statements lost through excessive publication any immunity the judicial proceeding privilege might otherwise have afforded them.[227] The Utah Supreme Court thus remanded the case to the trial court to hear the Pratts' defamation claim against Nelson and her lawyers.[228]

4. Summary

Of the cases discussed above, *Landry's* is the most instructive. First, purely as a matter of litigation strategy or tactics, ALDF's decision to highlight the case in the media was a major misjudgment. By publicizing the litigation, ALDF forced Landry's to fiercely defend itself; for Landry's to do otherwise would risk conveying the impression that it was caught mistreating the tigers. Second, ALDF's decision to send a press release to the Denver TV station was even more unwise.[229] Although Landry's had a tiger exhibit in Denver, ALDF knew nothing about the care of the tigers there, and Denver residents could not reasonably be thought to have interests affected by a lawsuit filed in a city 1,000 miles away. Third, while Texas law on applying the litigation privilege to lawyers' or litigants' statements to the media was "less than clear" when ALDF publicized its allegations,[230] that uncertainty should have counseled restraint rather than green lighting a media campaign. That is especially true because the general rule elsewhere was (and is) that the litigation privilege does not attach to lawyers' statements to the media.[231] Fourth, ALDF's attorney immunity defense was destined to fail from the start. As the Texas Supreme Court pointed out, it does not take a lawyer to publicize a client's allegations to the media—anyone can do so, "and they commonly do so

225. *See id.*
226. *See id.* at 381.
227. *See id.* at 383.
228. *See Pratt*, 164 P.3d at 383.
229. *See* Landry's, Inc. v. Animal Legal Def. Fund, 631 S.W.3d 40, 44 (Tex. 2021) (describing the Denver TV station's article).
230. *See id.* at 47–48.
231. *See id.* at 50 ("Our understanding of the limits of the judicial-proceedings privilege is consistent with the weight of authority outside Texas.").

without the protection of immunity."[232] Not all lawyers' actions in service to clients are immunized.[233]

In *Topping*, the need for a press conference was at least arguable because Cardinal was considered a local political subdivision under a North Carolina statute,[234] such that the DHHS investigation and the Board's response could be seen as matters of public concern. But even if such public concern were true, a press conference is not an essential aspect of a judicial proceeding.[235] So, while Meyers had several defenses to Topping's claims against him, the absolute immunity afforded by the litigation privilege was not among them.[236]

Pratt was a textbook case of excessive publication. The Nelsons' statements to the press clearly were published to more people than necessary to resolve the litigation or further its objectives.[237] On top of that, the lawyers gave copies of the Kingston Complaint to reporters at the press conference.[238] Courts are generally unwilling to extend the litigation privilege to the republication of pleadings.[239] As the Eighth Circuit once explained, a privileged pleading cannot be a platform for disseminating defamatory matter to an audience with no connection to the proceeding.[240] Were the rule otherwise, a litigant bent on harming its adversary could make false and defamatory assertions in a pleading and then freely republish the offending statements armored against liability by the absolute litigation privilege.[241]

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232. *See id.* at 52.

233. *See id.* ("Some conduct by attorneys remains actionable 'even if done on behalf of a client.'" (quoting Youngkin v. Hines, 546 S.W.3d 675, 683 (Tex. 2018))).

234. *See* Topping v. Meyers, 842 S.E.2d 95, 98 (N.C. Ct. App. 2020).

235. *See id.* at 104.

236. *See id.* ("A litigant, or their counsel, who gives a press conference during a judicial proceeding is not deprived of defenses nor is necessarily liable for their statements. Neither are they absolutely immune from suit challenging and asserting defamatory conduct.").

237. *See* Pratt v. Nelson, 164 P.3d 366, 380 (Utah 2007).

238. *See id.* at 371.

239. *See, e.g.*, Newmyer v. Sidwell Friends Sch., 128 A.3d 1023, 1042 (D.C. 2015) ("Publicizing the complaint was gratuitous and bears no relevance whatsoever to the judicial proceedings. We decline to attach a privilege to such conduct."); Kennedy v. Zimmerman, 601 N.W.2d 61, 66 (Iowa 1999) (citation omitted) ("We recognize [that] statements contained in a petition . . . are absolutely privileged. However, republication outside a judicial proceeding of protected communications previously made in a judicial proceeding is not privileged."); Kiernan v. Williams, 2006 WL 2418861, at *7 (N.J. Super. Ct. App. Div. Aug. 23, 2006) ("Distribution to the press of court-filed documents is not protected because it bears no relation to the purpose of the privilege, and only serves the interest of the distributor."); Bochetto v. Gibson, 860 A.2d 67, 73 (Pa. 2004) ("As Gibson's act of sending the complaint to [a reporter] was an extrajudicial act that occurred outside of the regular course of the judicial proceedings and was not relevant in any way to those proceedings, it is plain that it was not protected by the judicial privilege.").

240. *See* Asay v. Hallmark Cards, Inc., 594 F.2d 692, 698 (8th Cir. 1979).

241. *See id.*

B. Courts Applying the Litigation Privilege to Lawyers' Media Activities

While most courts that have considered the issue have declined to apply the litigation privilege to lawyers' communications with the media, other courts following the Restatement approach have enforced the privilege in this context.

1. Applying the Privilege to a Post-Litigation Statement to the Press

Prokop v. Cannon is among the few cases in which a court has recognized the litigation privilege in connection with a lawyer's supposedly defamatory statements to the press.[242] Interestingly, the lawyer in *Prokop* made the challenged comments after the litigation was over.[243]

Prokop arose out of Dr. Robert Prokop's and Nancy Hoch's campaign for an elected position on the University of Nebraska Board of Regents.[244] Prokop sent a flyer that criticized Hoch's record to around 40,000 households in Nebraska.[245] When Hoch sought a retraction and Prokop refused, she sued him and alleged that his flyer contained multiple libelous statements.[246] Lawyers Martin Cannon and Michael O'Brien represented her in the lawsuit.[247]

After seven years of pretrial wrangling, Hoch dismissed her suit against Prokop with prejudice on the eve of trial.[248] On the same day that Hoch dismissed her case, the Omaha World-Herald newspaper published a story in which O'Brien was quoted as saying that Hoch had dismissed her lawsuit because she had halted Prokop's defamatory remarks.[249] The article quoted O'Brien as having said: "Once the libelous material was not being published, we accomplished our purpose . . . . She wanted to put a check in Dr. Prokop's apparent unbridled liberty to say whatever he felt like . . . ."[250]

One year later, Prokop sued Cannon and O'Brien.[251] Prokop alleged several causes of action, including libel and slander.[252] The trial court

242. *See* Prokop v. Cannon, 583 N.W.2d 51, 58–59 (Neb. Ct. App. 1998).
243. *See id.* at 55, 58–59.
244. *See id.* at 55.
245. *See id.*
246. *See id.*
247. *See id.*
248. *See id.*
249. *See id.*
250. *Id.* (internal quotation marks omitted).
251. *See id.*
252. *See Prokop*, 583 N.W.2d at 55.

sustained the defendants' demurrer, and Prokop appealed to the Nebraska Court of Appeals.[253]

Among his claims, Prokop alleged that O'Brien defamed him when he spoke to the Omaha World-Herald reporter.[254] The *Prokop* court flatly rejected this argument, finding that O'Brien's reported statement was "well within" his litigation privilege.[255] The court noted that section 586 of the Restatement (Second) of Torts clearly supported its conclusion:

> The privilege stated in this Section is confined to statements made by an attorney while performing his function as such. Therefore it is available only when the defamatory matter has some reference to the subject matter of the proposed or pending litigation, although it need not be strictly relevant to any issue involved in it. Thus the fact that the defamatory publication is an unwarranted inference from the evidence is not enough to deprive the attorney of his privilege.[256]

The *Prokop* court concluded that it was basically impossible for Prokop to successfully prosecute a defamation claim against O'Brien for his comments published in the newspaper article because they "clearly related" to Hoch's lawsuit and were absolutely privileged as a result.[257] The court therefore affirmed the dismissal of Prokop's defamation claims against Hoch's lawyers.[258]

2. Defending President Clinton in the Press

Jones v. Clinton was a much more intriguing case than *Prokop*, and it presented an interesting twist on the litigation privilege as applied to a lawyer's statements to the media. In *Jones*, Paula Jones sued then-President Bill Clinton on various theories tied to Clinton's alleged sexual harassment of her while she worked for an Arkansas state agency and while he was the governor of Arkansas.[259] She also sued Clinton for defamation based on pre-litigation statements made by his lawyer to the media in the lawyer's capacity as Clinton's agent.[260]

Jones's defamation claim was rooted in a pre-suit media event at which she and her lawyer publicly called on the president to admit his sexual misconduct and apologize.[261] Clinton refused and subsequently

253. *See id.* at 56.
254. *See id.* at 58.
255. *See id.*
256. *Id.* at 58–59 (quoting RESTATEMENT (SECOND) OF TORTS § 586 cmt. c (AM. L. INST. 1977)).
257. *Id.* at 59.
258. *See id.*
259. *See* Jones v. Clinton, 974 F. Supp. 712, 716–18 (E.D. Ark. 1997).
260. *See id.* at 718.
261. *See id.* at 717.

hired a lawyer who spoke to the media as the President's alleged agent.[262] In speaking to the media, the unnamed lawyer said that Jones's account of her interaction with Clinton was "'really just another effort to rewrite the results of the election' and 'distract the President from his agenda,'" who "asked rhetorically, 'Why are these claims being brought now, three years after the fact?'", and who suggested that her allegations could not be taken seriously.[263] When she later sued Clinton, Jones alleged that the lawyer's remarks were defamatory because they denied her allegations and questioned her motives in accusing Clinton as she had.[264]

The court dismissed Jones's defamation claim based on the litigation privilege.[265] The court recognized that a lawyer's statements made prior to a judicial proceeding may be absolutely privileged if they are connected to possible litigation.[266] Such was the situation here, in which Jones sued Clinton within three months after she and her lawyer publicized his behavior and he hired a lawyer to respond.[267] The court also determined that the lawyer's comments had at least some relation to the eventual litigation because they did nothing more than generally deny Jones's allegations and question her motives.[268] For that matter, the lawyer's statements that Jones called defamatory were essentially duplicated in Clinton's answer to her complaint and which clearly were absolutely privileged as statements made in a pleading.[269] With that in mind, and given the nature and timing of events, the court was left to conclude that the lawyer's statements to the media were connected to Jones's lawsuit.[270]

Interestingly, in addition to concluding that the lawyer's statements were protected by the litigation privilege, the *Jones* court explained that the statements were not actionable because Jones solicited them by using a public forum to provoke Clinton into responding to her claims.[271] "Invited defamation," which occurs when the plaintiff precipitates the allegedly defamatory statement's release, is not actionable.[272]

Along the same lines as invited defamation, a party's statements to the media about a case presumably increase the prospects of a court

262. *See id.*
263. *Id.* at 718.
264. *See id.*
265. *See id.* at 730.
266. *See id.* (citing RODNEY A. SMOLLA, LAW OF DEFAMATION § 8.03[1][b] & [c] (1996)).
267. *See id.* at 731.
268. *See id.*
269. *See Jones*, 974 F. Supp. At 731 (citing Selby v. Burgess, 712 S.W.2d 898, 900 (Ark. 1986)).
270. *See id.*
271. *See id.* at 732.
272. *Id.* (quoting Litman v. Mass. Mut. Life Ins. Co., 739 F.2d 1549, 1560 (11th Cir. 1984)).

finding a lawyer's responsive statements to the media to be related to the proceeding. Once a party publicizes a matter, it generally makes little sense to hold that an effectively invited response should be denied the protection of the litigation privilege due to excessive publication. Nevertheless, the safer course for a lawyer in that situation is to avoid taking the bait and confine her responses to communications directly with opposing counsel, statements in court documents, and arguments to the court.[273]

3. The Different Realm of Mass Tort Litigation

In *Helena Chemical Co. v. Uribe*, the New Mexico Supreme Court applied the litigation privilege to a lawyer's pre-suit and post-filing comments in connection with a mass tort case.[274] The plaintiff there, Helena Chemical Co. ("Helena"), manufactured crop protectants at a plant in Mesquite, New Mexico.[275] Arturo Uribe, a leader of the Mesquite Community Action Committee, organized a public meeting to address local residents' concerns about health and environmental hazards attributable to the Helena plant's release of toxic chemicals.[276] Uribe invited lawyers Linda Thomas and Michelle Wan of the Houston law firm of Thomas & Wan to attend the meeting to discuss citizens' concerns and potential litigation against Helena.[277] He selected Thomas and Wan because they had previously sued Helena in a toxic tort case in Texas.[278] Uribe also invited a political blogger, Heath Haussamen, to attend the meeting.[279] Haussamen accepted Uribe's invitation and later published a story about the meeting on his website, *Heath Haussamen on New Mexico Politics*.[280]

During the meeting, Thomas allegedly defamed Helena twice.[281] First, she allegedly said "that 'children are out here and they're playing in the yard, they're putting their hands in their mouth [sic], so they're really

273. *See* Kennedy v. Cannon, 182 A.2d 54, 59 (Md. 1962). Encouraging lawyers to exercise restraint when speaking to the press, the *Kennedy* court wrote:

> [T]he initial act of the State's Attorney in releasing his statement to the press must be disapproved. Nevertheless . . . appellee's legal duty in no way justified the publication of his defamatory reply statement. To hold otherwise would open the door to the universally condemned 'trial by press', a procedure forbidden to counsel and subversive of the fair and orderly conduct of judicial proceedings.

Id.

274. *See* Helena Chem. Co. v. Uribe, 281 P.3d 237, 244–47 (N.M. 2012).
275. *See id.* at 240.
276. *See id.*
277. *See id.*
278. *See id.*
279. *See id.*
280. *See id.*
281. *See id.*

getting a dose that way. Kids are at much greater risk.'"[282] Second, she reportedly said that Helena's conduct at its Mesquite plant seemed to be "pretty egregious."[283] In reporting on the meeting, Haussamen quoted Thomas on the egregiousness of Helena's conduct in connection with the potential lawsuit.[284]

Ten months later, Thomas & Wan sued Helena in Santa Fe County, New Mexico, on behalf of Uribe, his wife, and Mesquite's other residents.[285] The next day, Thomas held a press conference in Mesquite to discuss the lawsuit.[286]

Helena sued Thomas and Thomas & Wan for defamation in a different New Mexico county.[287] Thomas and her firm won summary judgment in the trial court on the basis that Thomas's offending statements were made in the course of contemplated or pending litigation, were related to that litigation, and were thus absolutely privileged.[288] Helena appealed to the New Mexico Court of Appeals, which reversed the trial court.[289] The court of appeals reasoned that Thomas's statements were not absolutely privileged because she made them in the presence of the press, which had no relationship to, or interest in, the case.[290] According to the court of appeals, Thomas's statements to the media did not advance or enhance the lawsuit, did not assist the lawyers in investigating their clients' claims or presenting them in court, and, in a worst-case scenario, could have tainted the jury pool.[291] The New Mexico Supreme Court granted the defendants' petition for a writ of certiorari, reversed the court of appeals, and affirmed the trial court.[292]

The *Helena Chemical* court analyzed first whether the litigation privilege applied to Thomas's pre-litigation remarks at the public meeting and, second, whether the privilege attached to her statements once suit was filed.[293] As for Thomas's statements at the public meeting, those would be absolutely privileged if (1) she was then seriously and in good faith contemplating litigation and (2) her statements were reasonably related to the contemplated lawsuit.[294] The court easily concluded that the first element was met; the harder question was whether Thomas's comments

282. *Id.* (alteration in original).
283. *Id.*
284. *Helena Chem. Co*., 281 P.3d at 240.
285. *See id.*
286. *See id.*
287. Helena also sued Uribe and his wife. *See id.*
288. *See id.* at 240–41.
289. *See id.* at 241.
290. *Id.*
291. *See id.*
292. *See id.*
293. *See id.* at 242.
294. *See Helena Chem. Co.*, 281 P.3d at 242.

during the public meeting were reasonably related to the contemplated litigation.[295] Haussamen's presence at the meeting complicated matters.[296] The court of appeals had determined that Thomas's statements failed the reasonable relationship test because Haussamen's inability to assist Thomas and Wan in investigating their clients' claims against Helena or in presenting those claims in court meant that he contributed nothing to the litigation.[297] The *Helena Chemical* court, however, concluded that the lower court had "interpreted too narrowly the important role the press may play in furthering the objects of mass-tort litigation by educating the public about the need for and availability of legal services."[298]

The *Helena Chemical* court agreed with Maryland's highest court and the Tennessee Supreme Court, which had previously held that lawyers' statements to the media in class actions or mass-tort cases generally are absolutely privileged.[299] Although the *Helena Chemical* court agreed with the Tennessee Supreme Court that unnecessary defamatory statements to people unconnected with a proposed lawsuit should not be privileged, and that lawyers' statements to the media should not be privileged if the lawyers have a feasible way to discern who would be interested in the case without relying on the media, there was more to the issue.[300]

> [I]n the context of class action or mass-tort litigation, when the attorney has an actual or identifiable prospective client, as a general rule the privilege should apply to communications with the press, because additional prospective clients constitute a large, diverse class of individuals who will be difficult to identify and educate about the need for and availability of legal services. In the context of class action or mass-tort litigation, the most economical and feasible method of informing potential litigants of prospective litigation affecting their interests may be through the press. Thus, use of the press as a conduit to communicate with additional potential class action or mass-tort litigants may be reasonably related to the object of the contemplated judicial proceeding.[301]

Helena argued that Thomas had not relied on the media to reach unknown potential plaintiffs, noting that neither Haussamen's blog post about the public meeting nor any statements at the press conference

295. *See id.* at 243.
296. *See id.*
297. *See id.*
298. *Id.* at 243–44.
299. *See id.* at 244–45 (discussing Norman v. Borison, 17 A.3d 697 (Md. 2011) and Simpson Strong-Tie Co. v. Stewart, Estes & Donnell, 232 S.W.3d 18 (Tenn. 2007)).
300. *Id.* at 245 (quoting *Simpson Strong-Tie Co.*, 232 S.W.3d at 26).
301. *Id.* at 245.

identified Thomas by name or provided her contact information.[302] The court rejected this argument because a lawyer who addresses the media to promote public awareness of litigation cannot control what journalists publish.[303] Here, Uribe invited Haussamen to attend the community meeting principally to raise public awareness about Mesquite residents' environmental and health concerns and only secondarily to signal prospective litigation.[304] Haussamen's failure to report Thomas's contact information was therefore immaterial to the privilege analysis.[305] The court thus concluded:

> The pre-litigation statements made by Thomas are absolutely privileged because the statements were made when a mass-tort lawsuit was seriously and in good faith being contemplated, and with the objectives of investigating the merits of potential litigation and identifying for the community those members who may have had a good-faith basis to pursue the litigation. In addition, the statements were made when Thomas both had identifiable prospective clients and while she was acting in her capacity as prospective counsel.[306]

The court next weighed Thomas's statement about groundwater contamination during the post-filing press conference.[307] That statement repeated allegations in the complaint filed against Helena.[308] Complaints filed with courts are absolutely privileged.[309] The court thus concluded that, by extension, Thomas's statement at the press conference was privileged.[310] In reaching that conclusion, the court focused on the limited scope of Thomas's statement.[311] The *Helena Chemical* court reasoned that any harm to a party resulting from the delivery of pleadings to the media could be no greater than if reporters located the pleadings on their own, and alerting the media to a lawsuit being filed—including a basic description of the allegations—is not practically different from providing the pleadings to the media.[312]

Helena contended that allowing "trial by press" might taint the jury pool.[313] The court agreed that this concern was legitimate and urged

302. *See id.*
303. *See id.* (quoting *Norman*, 17 A.3d at 717).
304. *See Helena Chem. Co*., 255 P.3d at 245.
305. *See id.*
306. *Id.* at 245–46.
307. *See id.* at 246.
308. *See id.*
309. *See id.*
310. *See id.*
311. *See id.*
312. *See id.* at 246–47 (quoting Dallas Indep. Sch. Dist. v. Finlan, 27 S.W.3d 220, 239 (Tex. App. 2000)).
313. *Id.* at 247.

lawyers to exercise caution when speaking with the media about litigation.[314] At the same time, New Mexico's legal ethics rules lessened this prospect by restricting lawyers' extra-judicial statements in jury cases, and New Mexico law permitted a change of venue when pretrial publicity has tainted the jury pool.[315] Plus, the press conference at which Thomas spoke was held in Mesquite, while the lawsuit was filed in Santa Fe, meaning that Mesquite residents would not be included in the jury pool and that the risk of tainting the jury pool was either minimized or eliminated.[316] Finally, because the press conference was conducted in Mesquite, Thomas's comments also furthered the object of the litigation by educating local residents about the accessibility of, and need for, legal counsel.[317] Here, "the legitimate, actual usefulness" of allowing Thomas to address the media outweighed the low risk of tainting the potential jury pool.[318] In the end, the *Helena Chemical* court affirmed the trial court's award of summary judgment to Thomas and her law firm.[319]

Lawyers should not read *Helena Chemical* too generously. The New Mexico Supreme Court was influenced by the fact that the case was a mass-tort action in which the health of all Mesquite residents was in question.[320] Most cases do not present a similar need for publicity. In terms of the pre-suit publicity, Thomas did not invite Haussamen to the community meeting—Uribe did.[321] In that way, the case differs from one in which a lawyer publicizes a case to champion a client's cause. Finally, as noted earlier, other courts reject the New Mexico Supreme Court's approach and instead hold that a lawyer's publication or republication of pleadings is generally not protected by the litigation privilege.[322] In some states, a law firm that merely posts a pleading on its website to demonstrate its experience in an area of law or type of litigation may lose its absolute privilege on the basis that it unacceptably republished the document.[323]

314. *See Helena Chem. Co*., 255 P.3d at 247.
315. *See id.*
316. *See id.*
317. *See id.*
318. *Id.*
319. *See id.*
320. *See id.* at 243–45.
321. *See id.* at 240.
322. *See supra* note 239 and accompanying text.
323. *See, e.g.*, Cole v. Patricia A. Meyer & Assocs., APC, 142 Cal. Rptr. 3d 646, 667–68 (Ct. App. 2012) (rejecting a claim of absolute privilege for a complaint posted in the "recent cases" section of a law firm's website on the basis that it was a republication to non-participants in the action); Bedford v. Witte, 896 N.W.2d 69, 72 (Mich. Ct. App. 2016) (stating that posting a complaint on the law firm's website was not absolutely privileged because it was not part of the judicial proceedings but was instead "extraneous and unnecessary" to them).

C. Class and Collective Actions

In deciding that Thomas's statements were absolutely privileged, the *Helena Chemical* court was persuaded by two cases in which the courts upheld the privilege in connection with class actions: *Simpson Strong-Tie Co. v. Stewart, Estes & Donnell*[324] and *Norman v. Borison*.[325] In fact, when it comes to lawyers' media activities, class and collective actions are different from other cases, as the *Simpson Strong-Tie Co.* court recognized when lawyers were sued for an allegedly defamatory newspaper ad soliciting potential class members:

> In some situations, attorneys may have no practical means of discerning in advance whether the recipients of the communication have an interest in the proposed proceeding. In that event, the attorney can only communicate with those having the ability and desire to join the proposed litigation by publishing the statement to a wider audience, which may include unconnected individuals. When the prerequisites of the privilege are satisfied, the privilege should not be lost based on this fact alone.[326]

Norman arose out of the lawyers' prosecution of a class action on behalf of victims of a "mortgage rescue scam."[327] The lawyers provided two newspapers with a copy of the class action complaint the day it was filed and furnished the papers with "verbal 'sound bites'" to accompany any resulting articles.[328] The court concluded that the lawyers' delivery of the complaint to the newspapers was privileged because "the press could be seen as a tool assisting in the notification to potential class members of the contemplated proceedings."[329] Similarly, the lawyers' verbal sound bites promoted public awareness of their putative class action.[330] The newspaper articles gave readers, and thus potential class members, important details about the mortgage rescue scam.[331] Thus, the *Norman* court cautiously applied the litigation privilege to the lawyers' statements, reasoning that the lawyers should not be barred from promoting their proposed class action suit, nor should they be prohibited from speaking to the media in the process, so long as they were not framing the suit as a class action as a pretext for defaming the defendants.[332]

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324. Simpson Strong-Tie Co. v. Stewart, Estes & Donnell, 232 S.W.3d 18 (Tenn. 2007).
325. Norman v. Borison, 17 A.3d 697 (Md. 2011).
326. *Simpson Strong-Tie Co.*, 232 S.W.3d at 26.
327. *Norman*, 17 A.3d at 702.
328. *Id.* at 702, 717.
329. *Id.* at 716.
330. *See id.* at 717.
331. *See id.*
332. *See id.* at 717–18.

Killmer, Lane & Newman, LLP v. BKP, Inc., is the latest case in which a state supreme court held that class counsel's press statements were protected by the litigation privilege.[333] In *Killmer*, attorney Mari Newman of Killmer, Lane & Newman, LLP and an attorney from another law firm, Towards Justice (described collectively by the court as "the attorneys"), filed a class action in federal court on behalf of nail technician Lisa Miles and others similarly situated against BKP, Inc., Ella Bliss Beauty Bar LLC, Ella Bliss Beauty Bar-2, LLC, and Ella Bliss Beauty Bar-3, LLC (described collectively by the court as "the employer").[334] The employer operated three beauty salons in metropolitan Denver.[335]

The complaint alleged that the employer's business depended on the exploitation of its employees in various respects, all in violation of the Colorado Wage Claim Act and the federal Fair Labor Standards Act.[336] On the same day that the lawsuit was filed, Newman spoke at a press conference and said:

> For no pay whatsoever, they [i.e., the service technicians] have to clean the business, including the bathrooms, because Ella Bliss Beauty Bar is simply too cheap to pay its workers the money they deserve.
>
> Instead of paying the workers for every hour that they work they [i.e., the employer] pick and choose and only pay for the hours they feel like paying. It is time for businesses to quit financially exploiting women. Oppression of vulnerable workers remains all too common, and this is a particularly audacious case.
>
> It's [i.e., conduct like that alleged is] fairly common in industries that employ populations they think they can take advantage of, like women or immigrants.[337]

The attorneys also issued a press release that repeated the statement about exploiting women and oppressing workers and further announced that "'Ella Bliss Beauty Bar forced its service technicians to perform janitorial work without pay, refused to pay overtime, withheld tips, and shorted commissions.'"[338] Denver-based news organizations published articles about the press conference in which they repeated some of Newman's statements.[339] Denver TV stations broadcast stories that included video from the press conference.[340]

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333. *See* Killmer, Lane & Newman v. BKP, Inc., 535 P.3d 91, 93–94, 100 (Colo. 2023).
334. *Id.* at 94.
335. *See id.*
336. *See id.*
337. *Id.*
338. *Id.* (quoting the press release).
339. *See id.*
340. *See id.*

The employer sued the attorneys in a Colorado state court.[341] The employer alleged that Newman's statements and the attorneys' additional statement in the press release were defamatory and intentionally interfered with the employer's contractual relations.[342] The attorneys moved to dismiss the lawsuit based on the litigation privilege.[343] The trial court eventually dismissed the case on other grounds.[344]

The employer appealed and a panel of the Colorado Court of Appeals reversed the trial court with respect to the application of the litigation privilege.[345] The court of appeals reasoned:

> [T]he attorneys' purported purpose in speaking at the press conference and issuing the press release was to promote their class action and potentially reach service technicians who had worked for the employer, so that such technicians "could join the suit as class members or additional class representatives, step forward as witnesses, or pursue the claims themselves outside the class action." . . . [H]owever, the class action complaint undermined this stated purpose because it alleged that "[t]he exact size of the class will be *easily ascertainable* from [the employer's] records" and "[t]he contours of the class will be *easily defined* by reference to the payroll documents [the employer was] legally required to create and maintain." If this were so, . . . then there would be no "need" to communicate with the public and potential class members and witnesses through the press. Specifically, because "the attorneys had a 'feasible way' of figuring out who in their audience had an interest in the case," given the class action complaint's allegation that "finding the nail technicians who had an interest in the case would be 'easy,'" the attorneys had "no rational reason to make the statements to the general public."[346]

The attorneys then successfully petitioned the Colorado Supreme Court for review.[347]

Before the Colorado Supreme Court, the attorneys asserted that the court of appeals erred when it found that the litigation privilege did not apply because they had pleaded in the complaint "that the 'exact size' and 'contours' of the class would be '*easily ascertainable* from [the employer's] records and 'payroll documents,' thereby undermining any need to speak with the press and issue the press release."[348] The *Killmer*

341. *See id.*
342. *See id.*
343. *See Killmer*, 535 P.3d at 94–95 (Colo. 2023).
344. *See id.* at 95.
345. *See* BKP, Inc. v. Killmer, Lane & Newman, LLP, 506 P.3d 84, 88, 99 (Colo. App. 2021), *rev'd*, 535 P.3d 91, 101 (Colo. 2023).
346. *Killmer*, 535 P.3d at 95 (citations omitted) (quoting *BKP, Inc.*, 506 P.3d at 93–94).
347. *See id.*
348. *Id.* at 97.

court agreed and concluded that it was unreasonable to condition application of the litigation privilege on whether class counsel had alleged that the class was ascertainable.[349] For one thing, in class actions, "ascertainability" specifically refers to the requirement that a proposed class be objectively defined so that it is possible to determine whether a particular person is a member of the class.[350] It was therefore predictable that the attorneys would plead the class's ascertainability in their complaint, and to strip them of the protections of the litigation privilege for their related public statements would significantly diminish the privilege's efficacy in class actions.[351] For another thing, because the purpose of the press conference was to promote the class action and to reach unknown potential class members at the outset of the case, it was immaterial whether the attorneys believed they could ascertain the class from the employer's business records.[352]

Next, the *Killmer* court considered the parties' positions consistently with the common formulation of the litigation privilege set forth in section 586 of the Restatement (Second) of Torts, which provides that lawyers enjoy an absolute privilege to publish defamatory statements in a judicial proceeding "in which they participate as counsel if the statements (1) have 'some relation to the subject matter of the . . . litigation,' and (2) are 'made in furtherance of the objective of the litigation.'"[353] In line with its reliance on the Restatement, the court rejected the attorneys' request to implement a bright-line rule of always allowing defamatory statements when announcing a class action.[354] The court instead focused on whether "the allegedly defamatory statements had some relation to, and were made in furtherance of, the objective of the class action litigation."[355] The court easily concluded that, in this case, they did.[356]

First, Killmer's remarks at the press conference and the statements in the press release merely described the class action and were means of

349. *See id.*

350. *Id.* (quoting BP Am. Prod. Co. v. Patterson, 263 P.3d 103, 114 (Colo. 2011)).

351. *See id.*

352. *See id.* As the court further explained, "the eventual identification of class members by way of documents obtained during discovery is not a substitute for reaching absent class members and witnesses in the beginning stages of litigation when class counsel is shoring up their pleadings, locating additional class representatives, planning discovery, and crafting litigation strategy." *Id.* at 98. For these reasons, "early outreach through the press can benefit a class action regardless of whether" the class can be ascertained through information learned through discovery. *Id.*

353. *Id.* at 99 (quoting Club Valencia Homeowners Ass'n v. Club Valencia Assocs., 712 P.2d 1024, 1027–28 (Colo. App. 1985)).

354. *See id.*

355. *See id.*

356. *Killmer*, 535 P.3d at 99.

publicizing the litigation.[357] Therefore, both communications had some relation to the subject matter of the litigation.[358] Second, the court embraced the majority view that lawyers' statements to the media that merely repeat and explain the allegations in a class action complaint further the object of the litigation by notifying the public, absent class members, and witnesses about the case.[359]

In the end, the *Killmer* court held that the disputed statements, "which merely repeated, summarized, or paraphrased allegations made in the class action complaint, and which served the purpose of notifying the public, absent class members, and witnesses about the litigation," were absolutely privileged.[360] The Colorado Supreme Court accordingly reversed the court of appeals and remanded the case to the trial court for further proceedings.[361]

As supportive as *Killmer*, *Simpson Strong-Tie Co.*, *Norman*, and *Helena Chemical* may be, they should not be understood to mean that styling a case as a class action gives the plaintiffs' lawyers a license to defame.[362] In the class and collective action contexts, as in others, the application of the litigation privilege to lawyers' statements to the media depends on the facts.[363] For instance, the litigation privilege may not shield lawyers' allegedly tortious statements to the media if the lawyers have a reasonable alternative means of identifying potential plaintiffs.[364]

V. LAWYERS' ALTERNATIVE DEFENSES

Again, in most cases, lawyers who are sued for defamation or other torts arising out of their communications with the media will not be shielded against liability by the litigation privilege or by attorney immunity.[365] Despite the favorable holdings in *Simpson Strong-Tie Co.*, *Norman*, *Helena Chemical*, and *Killmer*, even lawyers' media

357. *See id.* (quoting BKP, Inc. v. Killmer, Lane & Newman, LLP, 506 P.3d 95 (Colo. App. 2021), *rev'd*, 535 P.3d 91, 93–94, 101 (Colo. 2023)).

358. *See id.* (citing Helena Chem. Co. v. Uribe, 281 P.3d 237, 246 (N.M. 2012)).

359. *See id.* at 99–100 (first citing Norman v. Borison, 17 A.3d 697, 716 & n.23 (Md. 2011); then citing *Helena Chem. Co.*, 281 P.3d at 246–47; and then citing Simpson Strong-Tie Co. v. Stewart, Estes & Donnell, 232 S.W.3d 18, 20, 26 (Tenn. 2007)).

360. *Id.* at 100.

361. *See id.* at 101.

362. *See Norman*, 17 A.3d at 717–18 (cautioning lawyers that they cannot invoke class action status as a subterfuge for making defamatory statements about parties or others to the media).

363. *See Killmer*, 535 P.3d at 99 (rejecting a bright-line rule and determining the privilege's application based on "the facts before [the court]").

364. *See, e.g.*, *Simpson Strong-Tie Co.*, 232 S.W.3d at 26 (taking this position).

365. *See* Jacobs v. Adelson, 325 P.3d 1282, 1286 (Nev. 2014) (stating that most states have held that the absolute litigation privilege does not apply to lawyers' communications with the media and collecting related cases); Landry's, Inc. v. Animal Legal Def. Fund, 631 S.W.3d 40, 52 n.13 (Tex. 2021) (collecting cases rejecting the litigation privilege).

communications related to class or collective actions are not assured of protection.[366] The fact that a lawyer's statements are not absolutely privileged or that a lawyer does not enjoy attorney immunity, however, does not mean that the lawyer will necessarily be held liable for allegedly tortious statements at a press conference, in a press release, or in an interview with a journalist or for republishing a pleading that contains reputationally bruising averments. Lawyers plainly have other defenses to any associated claims against them.[367]

First, lawyers' challenged statements may not be defamatory.[368] For example, in *Dello Russo v. Nagel*, ophthalmologist Joseph Dello Russo sued lawyer Bruce Nagel and his law firm after they ran a newspaper ad to solicit potential plaintiffs who might have malpractice claims against the doctor and his clinic.[369] The ad asked if readers were treated by Dr. Dello Russo or a second doctor at the clinic and "whether they 'suffered a bad result from eye surgery.'"[370] The ad offered a free legal consultation to readers who were displeased with their treatment.[371] In rejecting Dr. Dello Russo's defamation claim premised on the "bad result" language in the ad, the court pointed out that the defendants had not accused him of incompetence or stated that he historically disserved his patients.[372] Rather, the term "bad" as used in the ad was insignificant because Nagel and his colleagues were simply trying to limit the patients who called them to those who were dissatisfied with their surgical results.[373]

Second, for lawyers to be liable for defamation, their disputed statements of fact must be false.[374] Lawyers' disparaging statements may

366. *See, e.g.*, Green Acres Tr. v. London, 688 P.2d 617, 622–23 (Ariz. 1984). The *Green Acres* court took a narrower view of the litigation privilege in class actions:

> [T]he recipient of the communications, the newspaper reporter, had no relation to the proposed class action. The reporter played no role in the actual litigation other than that of a concerned observer . . . . The press conference simply did not enhance the judicial function and no privileged occasion arose. Accordingly, the lawyer defendants were not absolutely privileged to publish the oral and written communications to the newspaper reporter.

Id.; *see also Killmer*, 535 P.3d at 99 ("[A]lthough the attorneys urge us to adopt a broad, bright-line rule that would *always* allow defamatory statements in the context of announcing a class action, we need not—and, thus, do not—adopt such a rule.").

367. The defenses discussed below are not intended to be an exclusive or exhaustive list.

368. *See generally* Chau v. Lewis, 771 F.3d 118, 127 (2d Cir. 2014) ("Not all (or even most) maligning remarks can be considered defamatory.").

369. *See* Russo v. Nagel, 817 A.2d 426, 430 (N.J. Super. Ct. App. Div. 2003).

370. *Id.* (quoting the advertisement).

371. *See id.*

372. *See id.* at 432.

373. *See id.*

374. *See* GetFugu, Inc. v. Patton Boggs LLP, 162 Cal. Rptr. 3d 831, 842 (Ct. App. 2013) ("The sine qua non of recovery for defamation . . . is the existence of falsehood."

be true and therefore not defamatory.[375] Truth is an absolute or complete defense to defamation claims.[376] Moreover, for the speaker to avoid liability, a disputed statement need only be substantially true rather than literally or perfectly true.[377] Courts evaluate the truth of allegedly defamatory statements at the time they were made.[378]

Third, a lawyer's allegedly defamatory statement may be an expression of opinion.[379] Statements of opinion generally are protected speech under the First Amendment and thus are not actionable.[380] Whether a statement is one of fact or opinion is a question of law.[381] In

(quoting McGarry v. Univ. of San Diego, 64 Cal. Rptr. 3d 467, 479 (Ct. App. 2007))); Byrd v. Hustler Mag., Inc., 433 So. 2d 593, 595 (Fla. Dist. Ct. App. 1983) ("A false statement of fact is the *sine qua non* for recovery in a defamation action."); Fleischer v. NYP Holdings, Inc., 961 N.Y.S.2d 393, 394 (App. Div. 2013) (writing that "false factual statements" are "a sine qua non of a libel claim").

375. *See, e.g.*, Allstate Ins. Co. v. Shah, No. 2:15-cv-01786-APG-CWH, 2017 WL 1228406, at *3 (D. Nev. Mar. 31, 2017) (informing a newspaper that a case has been filed is not defamatory because it is a true statement); Cargill Inc. v. Progressive Dairy Sols., Inc., No. CV-F-07-0349-LJO-SMS, 2008 WL 2235354, at *6 (E.D. Cal. May 29, 2008) ("[C]ommunications truthfully informing the recipients about ongoing litigation [are] not defamatory. This is true even if these communications create a 'buzz,' or reach an audience greater than intended." (internal citation omitted)).

376. *See* Birmingham Broad. (WVTM-TV) LLC v. Hill, 303 So. 3d 1148, 1158 (Ala. 2020) (quoting Fed. Credit, Inc. v. Fuller, 72 So. 3d 5, 10 (Ala. 2011)); Tilkey v. Allstate Ins. Co., 270 Cal. Rptr. 3d 559, 583 (Ct. App. 2020); Lloyd v. Kuznar, 180 N.E.3d 353, 365 (Ind. Ct. App. 2021); Olney v. Town of Barrington, 118 N.Y.S.3d 898, 900 (App. Div. 2020); Taube v. Hooper, 840 S.E.2d 313, 319 (N.C. Ct. App. 2020); Nestler v. Scarabelli, 886 S.E.2d 301, 308 (Va. Ct. App. 2023). In fact, while courts often say that truth is an absolute or complete defense to defamation claims, it is the plaintiff's burden to prove the falsity of the challenged statement. *See* Hadley v. Doe, 34 N.E.3d 549, 557 (Ill. 2015) (explaining that to "state a cause of action for defamation, a plaintiff must present facts showing the defendant made a false statement about the plaintiff"); Armistead v. Minor, 815 So. 2d 1189, 1193 (Miss. 2002) (listing falsity as an element the plaintiff must prove in a defamation case). If the statement is true, the plaintiff cannot prove her prima facie case and she will lose. Thus, truth is not actually a defense to defamation, although defendants naturally assert the truth of their statements in response to defamation claims.

377. *See* Brokers' Choice of Am., Inc. v. NBC Universal, Inc., 861 F.3d 1081, 1109–10 (10th Cir. 2017); Dall. Morning News, Inc. v. Hall, 579 S.W.3d 370, 377 (Tex. 2019) (quoting 7 KBMT Operating Co. v. Toledo, 492 S.W.3d 710, 714 (Tex. 2016)); Thomas v. Sumner, 341 P.3d 390, 402 (Wyo. 2015) (quoting Tschirgi v. Lander Wyo. State J., 706 P.2d 1116, 1120 (Wyo. 1985)).

378. *See, e.g.*, Page v. Oath Inc., 270 A.3d 833, 847 n.104 (Del. 2022) ("We judge the truth of the allegations in an article at the time they were published, not with the benefit of hindsight.").

379. *See, e.g.*, *GetFugu, Inc.*, 162 Cal. Rptr. 3d at 842–43 (determining that a lawyer's Tweet expressing his subjective opinion about the plaintiff's corporate governance was not actionable).

380. *See* Fredin v. Clysdale, No. 18-cv-0510 (SRN/HB), 2018 WL 7020186, at *12 (D. Minn. Dec. 20, 2018) (applying Minnesota law).

381. *See* Law Offs. of David Freydin, P.C. v. Chamara, 24 F.4th 1122, 1129 (7th Cir. 2022) (applying Illinois law); U.S. Dominion, Inc. v. Fox News Network, LLC, 293 A.3d 1002, 1060 (Del. Super. Ct. 2023) (applying New York law); Hartman v. Kerch, 217 N.E.3d 881, 898 (Ohio Ct. App. 2023); SSS Fence, LLC v. Pendleton, 528 P.3d 304, 308

distinguishing between statements of fact and opinion, courts examine the totality of the circumstances.[382] With slight variation between jurisdictions, relevant factors in this exercise "include (1) whether the general tenor of the entire work negates the impression that the defendant asserted an objective fact, (2) whether the defendant used figurative or hyperbolic language, and (3) whether the statement is susceptible of being proved true or false."[383] Of course, a statement of pure opinion cannot be proven true or false.[384]

A statement of opinion may be actionable, however, if it implies the existence of false and defamatory facts.[385] On the other hand, liability for defamation will not lie if the defendant discloses the non-defamatory facts undergirding the opinion.[386] When a speaker or author "outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment."[387] For a lawyer concerned about liability for an opinion that implies a factual basis, the lesson is obvious: reveal the non-defamatory facts on which the opinion is predicated.[388]

Fourth, a lawyer's statements to the media may be protected by a qualified privilege even if they are not absolutely privileged. For instance,

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(Okla. Civ. App. 2022); Lilith Fund for Reprod. Equity v. Dickson, 662 S.W.3d 355, 363 (Tex. 2023).

382. *See* Dickinson v. Cosby, 225 Cal. Rptr. 3d 430, 457 (Ct. App. 2017); Choice Homes, LLC v. Donner, 976 N.W.2d 187, 203 (Neb. 2022); Gilson v. Am. Inst. of Alt. Med., 62 N.E.3d 754, 774 (Ohio Ct. App. 2016); RainFocus, Inc. v. Cvent. Inc., 528 P.3d 1221, 1230 (Utah Ct. App. 2023) (quoting West v. Thomson Newspapers, 872 P.2d 999, 1018 (Utah 1994)).

383. *Choice Homes*, 976 N.W.2d at 203–04 (footnote omitted); *see also* Greenberg v. Horizon Ark. Publ'ns, Inc., 522 S.W.3d 183, 190 (Ark. Ct. App. 2017) (offering nearly identical language); Neumann v. Liles, 369 P.3d 1117, 1125 (Or. 2016) (using very similar language in phrasing the test).

384. *See, e.g.*, McKee v. Laurion, 825 N.W.2d 725, 733 (Minn. 2013) (describing someone as "a real tool" reflects pure opinion "because the term 'real tool' cannot be reasonably interpreted as stating a fact and it cannot be proven true or false"); Garcia v. Semler, 663 S.W.3d 270, 283 (Tex. App. 2022) (concluding that Facebook posts describing the plaintiff as "pure evil" and as a "miserable, wretched little person" were not defamatory because they were statements of opinion that could not be factually verified).

385. *See* Piccone v. Bartels, 785 F.3d 766, 771 (1st Cir. 2015) (applying Massachusetts law); *Dickinson*, 225 Cal. Rptr. 3d at 457; Cousins v. Goodier, 283 A.3d 1140, 1158 (Del. 2022); Jacobs v. Oath for La., Inc., 221 So. 3d 241, 246 (La. Ct. App. 2017).

386. *See Piccone*, 785 F.3d at 771; J-M Mfg. Co. v. Phillips & Cohen LLP, 201 Cal. Rptr. 3d 782, 793 (Ct. App. 2016); Sarkar v. Doe, 897 N.W.2d 207, 226–27 (Mich. Ct. App. 2016); Young v. Wilham, 406 P.3d 988, 997 (N.M. Ct. App. 2017).

387. Partington v. Bugliosi, 56 F.3d 1147, 1156–57 (9th Cir. 1995).

388. *See Piccone*, 785 F.3d at 771 ("Thus, the speaker can immunize his statement from defamation liability by fully disclosing the non-defamatory facts on which his opinion is based.").

the statements may be shielded by the "fair report" or "fair reporting" privilege.[389] The fair reporting privilege is framed in section 611 of the Restatement (Second) of Torts: "The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported."[390] Although the fair reporting privilege is usually raised by members of the media as a defense to defamation claims, it is not limited to the media.[391] The privilege "extends to any person who makes an oral, written or printed report to pass on the information that is available to the general public,"[392] including lawyers.[393] The fair reporting privilege attaches to reports of court proceedings, as well as other judicial or quasi-judicial proceedings, such as those conducted by administrative agencies or executive or legislative bodies.[394] The privilege also applies to

389. *See* Candy v. People for the Ethical Treatment of Animals, No. 2221, 2021 WL 1346611, at *8 (Md. Ct. Spec. App. Apr. 12, 2021) (citing Piscatelli v. Smith, 35 A.3d 1140, 1149 (Md. 2012)); West v. Morehead, 720 S.E.2d 495, 498 (S.C. Ct. App. 2011) ("Under the law of defamation, . . . certain communications give rise to qualified privileges, including the privilege to publish fair and substantially accurate reports of judicial and other governmental proceedings without incurring liability."); McNamara v. Koehler, 429 P.3d 6, 9 (Wash. Ct. App. 2018) ("The fair report privilege is a conditional privilege that protects from liability for defamation a republisher of a statement made in the course of an official public proceeding, including judicial proceedings."). *But see* Argentieri v. Zuckerberg, 214 Cal. Rptr. 3d 358, 372 (Ct. App. 2017) (noting that California's fair reporting privilege is absolute); Adelson v. Harris, 402 P.3d 665, 667 (Nev. 2017) (stating that the fair reporting privilege is absolute if it applies).

390. RESTATEMENT (SECOND) OF TORTS § 611 (AM. L. INST. 1977).

391. *See* August v. Hanlon, 975 N.E.2d 1234, 1248 (Ill. App. Ct. 2012).

392. RESTATEMENT (SECOND) OF TORTS § 611 cmt. c (AM. L. INST. 1977).

393. *See, e.g.*, J-M Mfg. Co. v. Phillips & Cohen LLP, 201 Cal. Rptr. 3d 782, 794–96 (Ct. App. 2016) (applying the fair reporting privilege to a law firm's press release that accurately reported on a trial, the verdict, the legal consequences of the verdict, and several government officials' post-trial reactions); Neff v. McGee, 816 S.E.2d 486, 491 (Ga. Ct. App. 2018) (explaining that a lawyer's statements in an article about a lawsuit arising out of an auto accident he posted to his law firm website, which related to the dangers of Snapchat's speed filter that the defendant driver used on her cell phone to document her high speed, and his related statements to other media outlets, were protected by the fair reporting privilege); D'Alfio v. Theuer, No. CL10-1363, 2010 WL 7765601, at *3 (Va. Cir. Ct. Sept. 29, 2010). In exemplifying the application of the fair reporting privilege, the *D'Alfio* court stated:

> Because Theuer faxed the reporter exact copies of the complaint, the publication is, of course, an accurate account of the record. When Theuer sent copies of the complaints to the reporter, the civil complaint had been filed with the court and the EEOC complaints with the EEOC, making each a public record at the time of publication . . . . Accordingly, . . . Theuer's republication of the complaint to a reporter is protected by a qualified privilege.

D'Alfio, 2010 WL 7765601, at *3.

394. *See* RESTATEMENT (SECOND) OF TORTS § 611 cmt. d (AM. L. INST. 1977).

the republication of pleadings.[395] The party invoking the privilege bears the burden of establishing its application.[396]

The fair reporting privilege requires only that a lawyer's statements to the media be fair and accurate; they need not further the related litigation.[397] Lawyers are entitled to some leeway in their communications, meaning that the privilege will apply "even if there is a slight inaccuracy in details—one that does not lead the reader to be affected differently by the report than he or she would be by the actual truth."[398] Or, as a Tennessee federal court explained, "[s]mall discrepancies between the contents of the official action and the news report do not make a report unfair or inaccurate, so long as the statements in the news report are not false in relation to the contents of the official action."[399]

Although the fair reporting privilege is a qualified privilege and is thus surmountable, it generally cannot be overcome by proof of actual malice.[400] Rather, the privilege will be lost if the disputed communication is not a fair and accurate representation, report, or recounting of the related proceedings.[401] In this way, it may be said that the qualification is satisfied when the report is fair and accurate,[402] which is much like saying that the privilege either applies or it does not.[403] The privilege is lost, however,

395. *See* Sig Sauer, Inc. v. Jeffrey S. Bagnell, Esq., LLC, No. 3:22-cv-885 (JAM), 2023 WL 4421769, at *2–4 (D. Conn. July 10, 2023) (applying Connecticut law).

396. *See* Walker v. Beaumont Indep. Sch. Dist., 938 F.3d 724, 745 (5th Cir. 2019) (applying Texas law); Thomas v. Tel. Publ'g Co., 929 A.2d 993, 1006 (N.H. 2007).

397. *See* Argentieri v. Zuckerberg, 214 Cal. Rptr. 3d 358, 373 (Ct. App. 2017).

398. *Id.*

399. Hill v. Old Navy, LLC, 20 F. Supp. 3d 643, 648 (W.D. Tenn. 2014); *see also* Sullins v. Raycom Media, Inc., 996 N.E.2d 553, 564 (Ohio Ct. App. 2013) ("Variances from the verbatim record are permitted so long as the 'gravam[e]n,' 'gist,' 'sting,' or 'substance' of the underlying report is substantially correct."); Trainor v. Std. Times, 924 A.2d 766, 771 (R.I. 2007) ("With respect to the real-world application of the fair report privilege, a certain amount of "breathing space" is accorded to the publisher: the operative criterion is *substantial accuracy*, not perfect accuracy.").

400. *See* Solaia Tech., LLC v. Specialty Publ'g Co., 852 N.E.2d 825, 843 (Ill. 2006); Piscatelli v. Smith, 12 A.3d 164, 173 (Md. Ct. Spec. App. 2011), *aff'd*, 35 A.3d 1140 (Md. 2012); Larson v. Gannett Co., 940 N.W.2d 120, 131 (Minn. 2020) (citing Moreno v. Crookston Times Printing Co., 610 N.W.2d 321, 329, 333 (Minn. 2000)); Funk v. Scripps Media, Inc., 570 S.W.3d 205, 219 (Tenn. 2019). *But see* Neff v. McGee, 816 S.E.2d 486, 491 (Ga. Ct. App. 2018) (explaining that actual malice will defeat the fair reporting privilege).

401. *See Piscatelli*, 12 A.3d at 173; *Larson*, 940 N.W.2d at 131 (quoting *Moreno*, 610 N.W.2d at 331); *Funk*, 570 S.W.3d at 217.

402. *See* Bedford v. Witte, 896 N.W.2d 69, 74 (Mich. Ct. App. 2016) (quoting Stablein v. Schuster, 455 N.W.2d 315, 318 (Mich. Ct. App. 1990)).

403. *See* Salzano v. N. Jersey Media Grp., Inc., 993 A.2d 778, 796–97 (N.J. 2010). In attempting to characterize the fair reporting privilege, the *Salzano* court wrote:

> To us, the fair-report privilege is neither fish nor fowl—that is, it is neither purely absolute nor purely conditional. Rather, it is a hybrid; it is conditional insofar as it cannot attach unless the report is full, fair, and accurate. Once

when a defendant who reports her own defamatory statement made in a proceeding "illegitimately fabricated or orchestrated events so as to appear in a privileged forum in the first place," as when someone files suit "not with the aim of pursuing the purported legal objective, but to cause harm to another by pleading or announcing defamatory matter in court and then using the protective shield of the privilege to republish the defamatory matter to the world."[404]

VI. CONCLUSION

Lawyers who represent a president or ex-president are perhaps justified in litigating their clients' cases in the court of public opinion. Former President Trump seems to expect his lawyers to be media brawlers. One of former President Clinton's lawyers took a plaintiff's bait and attacked the plaintiff's motives in the press with Clinton's apparent blessing. Lawyers may have other prominent clients or handle high-profile matters that arguably require them to formulate related media strategies. But, in fact, such clients and controversies are few and far between. Plus, in sharing information with the media, lawyers must appreciate the risks that come along with publicizing their clients' positions. Some of these risks are practical and most affect the lawyer's client, such as the chance that a lawyer's press statements will harden an adversary's resolve to litigate the case to its conclusion rather than settling. Critically, however, lawyers who publicize their clients' cases also risk personal liability. Lawyers who are sued for defamation or other torts arising out of their media activities will rarely be protected against liability by the litigation privilege or attorney immunity. Even an act as seemingly innocuous as posting a complaint that has been filed with a court on a law firm's website in an effort to highlight a client's cause may expose a lawyer to liability. Long story short, lawyers are wise to litigate their cases in court rather than in the media.

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that condition is met, the privilege becomes absolute and cannot be defeated.

Id.

404. Rosenberg v. Helinski, 616 A.2d 866, 876 (Md. 1992).