

# How New Cases Are Expanding Parameters of Litigation Privilege

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Recently, the Massachusetts Supreme Judicial Court joined a growing number of jurisdictions pushing the boundaries of the litigation privilege, which has continued to evolve in use and impact since appearing centuries ago in English common law.

The litigation privilege has immunized attorneys from non-client claims of defamation arising from oral and written statements made in connection with litigation. State-level activity suggests further expansion of its parameters.

## Justification and Evolution

The rationale behind the privilege is simple: attorneys must be able to represent their clients freely and zealously, without fear of facing civil liability for choice of words or unfettered reliance on information provided by a client.

Absent the privilege, lawyers would be unjustly divided between advocating for their clients and protecting themselves from suit by their adversaries.

Since its 19th-century adoption in the US, the privilege has evolved in various ways. First, it expanded to protect attorneys from suit for statements made in connection with contemplated or pending litigation, including out of court statements.

The privilege has been applied to communications made in connection with quasi-judicial proceedings such as arbitrations.

And many jurisdictions have extended the privilege to bar claims for torts other than defamation such as intentional infliction of emotional distress, negligence, and even fraud—on grounds that immunity from suit sounding in defamation alone would hold little value if attorneys still faced liability for their words under other theories.

## New Cases Expand Parameters

In Massachusetts, the Supreme Judicial Court tackled in *Bassichis v. Flores*\* the burgeoning question of whether the privilege protects attorneys from liability to non-clients arising from actions taken in connection with litigation, or whether the privilege solely protects oral and written statements.

In examining this question, the court considered the viability of claims pressed by a non-client against an attorney, who represented a woman in connection with her divorce. He helped the divorcing couple transfer marital assets into the wife's possession with the understanding that doing so would place the assets outside the reach of the husband's bankruptcy creditors.

The husband's creditors sued the attorney for his part in "orchestrat[ing] the scheme" that put the couple's assets out of their reach. The attorney claimed his actions were protected by the litigation privilege.

While at least one court in Kentucky has declined to extend the litigation privilege to bar suits arising from attorney conduct, the *Bassichis* court concluded, joining a growing number of courts around the country, that there is "no compelling reason to distinguish between communications ... and conduct occurring during the litigation process."

The Massachusetts court was persuaded that the policies behind the privilege should apply with equal force to protect attorney conduct in connection with litigation—promotion of zealous advocacy, advancement of the court's truth finding function, protection for the finality of judgments, and preventing attorneys from diverting time that could be best spent representing clients to their own defense.

The court reasoned that "[t]he strategic decisions a lawyer makes in an effort to serve his or her client warrant protection from civil liability, regardless of whether those decisions require the lawyer to speak or to act on the client's behalf."

In *Bassichis*, Massachusetts has joined jurisdictions such as Florida and Texas in holding that the litigation privilege provides attorneys with absolute immunity from suits by non-clients arising from actions taken in connection with litigation, regardless of malice, bad faith, or other nefarious motives on the part of the attorney.

The *Bassichis* court noted that "it is preferable to bar all actions based on statements [and actions] made in the course of litigation, rather than to open the floodgates to groundless lawsuits that would clog the courts ..." However, the privilege will not completely shield attorneys from liability for wrongdoing.

Attorneys remain subject to sanctions, contempt orders, and disciplinary actions. Other jurisdictions like Hawaii, Tennessee, Idaho, Illinois, Minnesota, Missouri, New York, Oregon, and Utah have held that while the litigation privilege generally bars suits relating to attorney conduct, it will not provide protection where there is proof of malice, bad faith, deliberate intent to hurt the third party.

Nor will it provide protection where an attorney acted outside the scope of the representation or for their own interests.

## **Where to From Here?**

While *Bassichis* shows the scope of the litigation privilege continues to evolve, it remains to be seen whether courts will push the confines of the privilege beyond the litigation context. *Bassichis* notes that Massachusetts has once declined to do so—however, that court was not presented with an opportunity to revisit that ruling in *Bassichis*.

If, as *Bassichis* finds, sanctions, contempt, and other disciplinary proceedings can sufficiently address potential attorney misconduct, why then should the privilege only apply to statements or conduct relating to a litigation when transactional lawyers are held to the same ethical standards as litigators?

Just last year, the Supreme Court of Texas expanded the privilege—called attorney immunity in Texas—to apply to claims based on conduct outside the litigation context, finding that the reason for the privilege applies with equal force to transactional representations. Whether other courts follow suit is yet to be seen.

*\*The case is Bassichis v. Flores, 490 Mass. 143, 189 N.E.3d 640, 7/1/22.*