Litigation Privilege Does Not Bar Malpractice Claim

Avoiding Liability

By Jeffrey P. Lewis

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The common-law privilege of judicial immunity, otherwise known as the litigation privilege, "generally protects an attorney from civil liability arising from words he or she has uttered in the course of judicial proceedings." *Loigman v. Twp., Comm. of Middletown,* 889 A.2d 426 (2006). It "protects attorneys not only from defamation actions, but also from a host of other tort-related claims." *Id.* This doctrine serves the public policy of ensuring that issues in the litigation "are aired and explored in a manner that is unfettered by the threat of defamation [and other] lawsuits." *Huhta v. State Board of Medicine,* 706 A.2d 1275, 1276 (Pa.Cmwlth. 1997), *Pet. for Allowance of Appeal denied,* 727 A.2d 1124 (Pa. 1998).

The doctrine is recognized under Pennsylvania law, where it extends to all participants in a lawsuit, including judges, parties and witnesses. It can extend to pre-trial communications, but it does not apply to communications made by an attorney to the press concerning on ongoing case. See *Bochetto v. Gibson,* 580 A.2d 67 (Pa. 2004). It also does not shield a licensed professional from a disciplinary action for conduct in litigation that would be immune to a civil claim. See, e.g., *Huhta v. State Board of Medicine, Supra.* Under Pennsylvania law, the yardstick for its application is that "the statements [must be] pertinent and material to the litigation." *Post v. Mendel,* 507 A.2d 351, 356 (Pa. 1986).

In a recent case, an insurance defense attorney raised the litigation privilege as a defense to a malpractice claim because of a report he had made to the carrier's successor that prompted that entity to stop providing a defense. In *Buchanan v. Leonard,* 52 A.3d 1064 (Sup. Ct. N.J. A.D. 2012), an insurance carrier, pursuant to the terms of a professional liability policy, had retained a law firm to defend an attorney [attorney] sued in a legal malpractice action by clients he had represented in a Chapter 13 bankruptcy action. The firm assigned the case to one of its attorneys [defense counsel].

The attorney had allegedly informed his defense counsel that he and his clients (the plaintiffs in the underlying malpractice action) had engaged in bankruptcy fraud by intentionally inflating the value of one of his clients' assets in their submissions to the bankruptcy court. Defense counsel did report this to the New Jersey Property-Liability Insurance Guaranty Association, which had assumed the handling of the claim because the carrier had been declared insolvent. But this fact did not get the guaranty association's attention until later, when defense counsel completed and submitted a form to seek settlement authority. The defense counsel noted on the form that the attorney had written a letter to his clients before filing the Chapter 13 action stating that the petition would contain misrepresentations and confirming that the clients had agreed to indemnify him "for any sanctions imposed for utilizing misleading figures." Defense counsel stated that "[t]his letter is an admission of bankruptcy fraud by [the attorney] and [his clients]. If the statute of limitations on the crime had not run, [the attorney] would be subject to up to [five] years in prison and/or a fine of up to $5,000. If the letter is disclosed at trial, the insured is still subject to discipline, which could include a period of suspension of his license."

That prompted the guaranty association, one week before trial, to advise the attorney "that it was withdrawing coverage and would not defend him in the lawsuit." The guaranty association advised the attorney that denial of coverage and a defense was prompted by his letter to his clients "pursuant to which you agreed and in fact did knowingly file a Chapter 13 petition on behalf of [your clients] containing material misrepresentations of fact." That letter further advised that the guaranty association "was declining coverage pursuant to a provision of the policy, which excluded coverage for any claim arising out of dishonest, fraudulent, criminal or malicious acts or omissions."

On the same day, the guaranty association commenced a declaratory judgment action seeking a declaration "that it was not obligated to provide coverage to the attorney." Ultimately, the attorney prevailed in that action when the court determined that the guaranty association did owe coverage to the attorney.

The attorney brought suit against defense counsel and his firm. In the complaint he alleged, among other things, that they "were negligent and careless in their representation of him in the [underlying malpractice action] because they failed to protect his interest, deliberately expressed an opinion contrary to his best interest and violated 'any semblance of their duty to maintain' his confidences." The complaint asserted claims of legal malpractice, "breach of contract, breach of fiduciary duty, tortious interference with a contract, defamation and unjust enrichment," the merits of all of which defense counsel and his firm denied.

The defamation claim was successfully defeated upon the basis that it was time barred. Defense counsel and his firm defended the remaining claims based upon the premise that the communication in question to the guarantee association was subject to the litigation privilege. Because the trial court, in granting summary judgment for defense counsel and his firm, found that the litigation privilege applied, it excused the failure of the defendants to produce an expert report in support of the malpractice claim. The Superior Court of New Jersey, Appellate Division, affirmed summary judgment on the defamation count but reversed summary judgment with respect to the remaining counts because it held that the litigation privilege does not apply under these circumstances. Citing New Jersey case law, it noted that this "privilege shields persons from liability arising from 'any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigant 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.' " The court observed that whether the privilege applies to claims brought by clients against their own attorneys presents an issue of first impression in New Jersey.

The court therefore held "that the litigation privilege does not protect an attorney from a claim by his or her client based upon statements the attorney made in the course of a judicial proceeding where, as in this case, it is alleged that the attorney breached his duty to the client for failing to adhere to accepted standards of legal practice."

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This reported decision does not address the thorny question raised concerning a duty to disclose whenever insurance defense counsel, whose only client is the defendant and not the carrier, possesses knowledge that, if reported to the carrier, would give it a basis to deny coverage and its duty to defend. That question will presumably be litigated on remand.